IMMIGRATION RELIEF UNDER THE CONVENTION AGAINST TORTURE FOR SERIOUS CRIMINALS AND HUMAN RIGHTS VIOLATORS

HEARING

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION,
BORDER SECURITY, AND CLAIMS

OF THE

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IMMIGRATION RELIEF UNDER THE CONVENTION AGAINST TORTURE FOR SERIOUS CRIMINALS AND HUMAN RIGHTS VIOLATORS

FRIDAY, JULY 11, 2003

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION,
BORDER SECURITY, AND CLAIMS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 9 a.m., in Room 2237, Rayburn House Office Building, Hon. John Hostettler (Chair of the Subcommittee) presiding.

Mr. HOSTETTLER. The Subcommittee will come to order.

The United States signed the Convention Against Torture and other cruel, inhuman, or degrading treatment or punishment in April 1988, and the Torture Convention was forwarded to the U.S. Senate for ratification, which occurred in October 1990. However, portions of the Convention Against Torture, or CAT, including the Article 3, the so-called "nonrefoulement" provision, were not self-executing.

The implementing legislation became law in October 1998. The Justice Department's regulations, which created immigration relief under the convention, took effect in March 1999. With the new form of relief from deportation available in March 1999, many aliens who had exhausted and were ineligible for all other forms of deportation relief filed motions to reopen or remand their cases so that they could now claim that they would be tortured upon return to their country, and therefore could not be deported.

From March 1999 through August 2002, the Justice Department adjudicated 53,471 alien applications for relief under the Convention Against Torture; 53,471 adjudications.

Certainly a large number of criminal and illegal aliens are claiming they will be subject to torture. Only 1,741 aliens were granted CAT relief by immigration judges during those 3½ years. Clearly many aliens are filing meritless claims and are using this international treaty as yet another immigration delay tactic to stay here in the U.S.

What is troubling is that 683 criminal aliens received such relief from immigration judges—aliens who have been barred from asylum and withholding of removal. This includes two murderers that we know of who killed a spectator at a Gambian soccer game and

one who is implicated in a mob-related deadly shoot-out in Uzbekistan.

Given the 2001 Supreme Court *Zadvydas* v. *Davis* decision stating aliens whose countries will not take them back cannot be detained indefinitely, the Department of Homeland Security, or DHS, has decided that it must eventually release these aliens back onto the streets. DHS statistics indicate that approximately 500 criminal aliens have been released into American communities because of *Zadvydas*. This includes the Uzbekistan case.

Some, including the State Department, argue that we cannot bar serious criminals and human rights violators from CAT relief in the immigration context, because we would be violating the convention. I argue that we already are violating the convention. The convention contains 33 articles. Most of them state that a party to the convention shall not torture, and if a torturer is residing in a party country, the country is supposed to investigate, detain, prosecute, and extradite the torturer, if applicable, and possibly compensate victims. We are not doing any of this. Known foreign torturers are living in our midst, untouched. Nationals from Haiti, Somalia, and other countries with former repressive regimes identify past persecutors and torturers from their country in their American neighborhoods, shocked, and rightly so, that these bad actors live so freely in the U.S..

The Justice Department is not detaining these people, investigating them criminally, or prosecuting them as we are obligated to do under the Torture Convention. The Justice Department argues that they have too few resources and more important concerns than to investigate and prosecute foreign nationals who committed acts on foreign soil. That is violating our commitment under the convention.

In addition, the law permits the State Department to seek diplomatic assurances that an alien would not be tortured if returned to a country. The State Department is not using this avenue either. Instead of the Government living up to its responsibilities under the Torture Convention, these bad actors are permitted to use the convention as a defense to deportation based on one article in the convention which states that a party cannot return a person to a country in which it is more likely than not that the person would be tortured.

So our immigration courts have become the only entity responsible for implementing our responsibilities under the convention. I seriously doubt that was the intent when we signed the convention and when the Congress passed the implementing legislation. In the implementing legislation for the convention, the Congress expressly stated in a subsection headed "exclusion of certain aliens" that to the maximum extent consistent with the obligations of the U.S. under the convention, the regulations required by the Senate legislation shall, quote, exclude from the protection of such regulations aliens described in section 241(B)(3)(b) of the Immigration Nationality Act, end quote. That section of the INA describes particularly serious criminals, terrorists, persecutors, genocide participants and dangers to the community. The Reno Justice Department disobeyed the Senate instruction by protecting such bad actors in the torture regulation.

So to those who argue we cannot exclude such aliens from CAT relief because we would be violating the convention, I say the convention should not be looked at in a vacuum. We must also look to the implementing language.

Given the Congress's direction to except serious criminals and persecutors from the regulations, I do not believe we would be violating our commitment to the convention. Legislation has been introduced this Congress and last Congress that would make serious human rights violators inadmissible and deportable, but unless the CAT regulations are changed, placing human rights violators in removal proceedings will be a waste of time and money because they will likely be granted CAT protection and will be back on the streets. So why go through the expensive and timely court and appeal exercise?

In conclusion, let me reiterate that this hearing does not concern the thousands of foreign nationals that enter this country, both legally and illegally, to seek refuge from an oppressive and potentially torturous regime for, say, political or religious purposes. Rather, it is to inform the Congress and the American people of this disturbing and dangerous loophole; disturbing and dangerous because it has resulted in the presence on our Nation's streets of hundreds of dangerous aliens. Therefore, we will receive testimony as to the need for a change in the law to close that loophole.

At this time I recognize my colleague, the Ranking Member of the Subcommittee, Ms. Jackson Lee of Texas for an opening statement.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. And let me thank the witnesses for their presence here today.

I think we all can agree that over the last couple of days we have seen the aspect of our Intelligence Community needs a lot of help, and so I can imagine the consternation of the Chairman on the number of 600 that may have, if you will, tainted what I think is an extremely important convention that has been signed by the United States. Because we have warts in our system, I don't believe we should thwart the United Nations Convention Against Torture when there are so many that are in need.

Though this is not directly related to the accessing of legalization, I always remind my colleagues that immigration does not equate to terrorism. Certainly amongst the many that may be applying for relief under this particular convention, there may be some of those who are less than desirable elements in this country, but, again, I think that we can focus more on rebuilding and fixing what is still a broken intelligence system to be able to protect the United States, rather than eliminating or undermining what are very important provisions to protect people's lives.

The United Nations Convention Against Torture is a fundamental pillar of our human rights and national interest policy. It prohibits our removal and extradition processes from turning aliens—returning aliens to countries where they probably would be tortured. It may increase the likelihood that torturers and other major human rights abusers will be held accountable for their actions through criminal prosecutions and civil liability lawsuits in U.S. courts. It supports our efforts to promote human rights compliance and prevent torture in foreign nations, and it encourages

the growth of human rights-oriented standards and institutions throughout the world.

Just yesterday I asked the President to send peacekeeping and humanitarian troops into Liberia. I gave a litany of reasons. Specifically, I indicated it is not a declaration of war. At the same time, I have joined the President in asking for Charles Taylor to step down and leave the country, but I have added to my request that Charles Taylor be immediately tried for war crimes, as he has been indicted. I am not out to let the scandals and the scoundrels escape, but I am out to protect this convention because it has value and purpose.

The Convention Against Torture is one of the four primary international human rights documents. It stands along with the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Genocide Convention as the cornerstone of our country's and the international community's effort to stop the most heinous forms of governmental oppression and abuse.

I am disappointed that the United States is one of the only remaining countries that has not signed the convention regarding children; and therefore, we suffer in this country with enormous abuse of our children, constantly, because of some political issues that we have with the convention that the world has promoted to protect our children of the world.

However, Article 3 of the convention that we speak of today forbids a state party from forcibly returning a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. This is country-specific. The prohibition does not bar forcibly returning the person to other countries in which he or she would not be in danger of being subjected to torture. There lies our relief.

I support this absolute standard, because torture is so horrendous and contrary to our ethical, spiritual, and democratic beliefs that it must be absolutely condemned and prohibited.

This past week we saw a number of boys, young men now, from Sudan. Anyone can tell you the horrific activities that have gone on in the Sudan. Anyone can tell you of the horrific amputation policies in Sierra Leone, the raping of women who are pregnant, the stripping of babies from the wombs of mothers. This is torture that maybe the United States is not familiar with, and so we might cavalierly this morning talk about eliminating a provision or amending this convention on the basis of a few hundred. We have relief. We can deport them elsewhere.

Even the most abhorrent individuals, including criminals and torturers themselves, are entitled to invoke the protections of CAT in order to prevent from being returned to torture in their home countries. As I said, return them elsewhere.

In the Davis case of the United States Supreme Court, the United States held that—or the Supreme Court held that the detention provisions in the Immigration Nationality Act read in light of the Constitution's demands limit an alien's post-removal period detention to a period reasonably necessary to bring about that alien's removal from the United States. The Supreme Court found, further, that once removal is no longer reasonably foreseeable, con-

tinued detention is no longer authorized by statute except where special circumstances justify continued detention. The special circumstances may indicate that continued detention is necessary to protect the public, and I would agree with that.

In response to that, the Supreme Court decision, the former Immigration and Naturalization Service promulgated regulations for determining the circumstances under which an alien may be held in custody beyond the statutory removal period. These regulations authorize the Government to continue to detain aliens who present foreign policy concerns or national security or terrorism concerns as well as individuals who are especially dangerous due to a mental condition or personality disorder, even though their removal is not likely in the reasonably foreseeable future.

While we may be prohibited from sending them back to their home countries, we are under an obligation to criminally prosecute them for acts of torture or other international or domestic crimes.

Also, although the grant of CAT protection is absolute, it is not permanent relief. It can be removed when the conditions in the home country change so as to eliminate the risk of torture. Therefore, we have options. We have acted. We have regulations. We have relief. We have made a commitment not to practice or tolerate torture under any circumstances or for any reason. I do not believe that Congress at this time should tamper with that commitment.

I believe that we should view that commitment as ultimate relief with the relief that we already have parallel to this convention that will protect the American people. What are our values? Are we willy-nilly because we have some sort of disagreement with our immigration policies to be able to undermine values that we have had in this country over and over again? I believe that we can and we must honor that commitment, and we can do so without endangering our society.

Mr. Chairman, we are not the Intelligence Committee, I realize that. But as I have looked over the last few days' of statements, I would begin to wonder whether we have the ability to protect ourselves with a legitimate and strong Intelligence Community. I respect those who are working hard, but I would hope Congress would look carefully at our Intelligence Community, as we might look to improve the information provided to this body, to the Executive.

Certainly there are some issues that I hope to be looking at, particularly in this Committee. But I think that we can find other ways of addressing this Committee's and the Congress's concern about this convention. I would ask that we listen intently to the witnesses, but yet I would also say that we might be moving too quickly against our values that I think are extremely important in this instance, and I thank the Chairman for yielding and I yield back.

Mr. HOSTETTLER. Thank the gentlelady.

The Chair now recognizes the gentleman from Iowa, Mr. King, for an opening statement.

Mr. KING. Thank you, Mr. Chairman, and I will be brief. I want to get to the testimony, and I am looking forward to hearing the testimony. I thank you all for being here today to make this presentation. It is an important issue.

You know, the concept that we cannot return a person who is guilty of torture to those whom he has tortured is something that baffles me. If they had committed a crime of murder or some other crime of—a violent crime within a country, we would return them back to the country for that reason.

And so this is a dangerous loophole, as the Chairman has pointed out, and it is dangerous in this country when we release this number of approximately 683 that I am looking at, and of those we have some evidence that at least two have committed murder. I expect that is murder of American citizens. I know at these hearings in this room a few weeks ago, I asked the—actually the staff of one of the Members of Congress who testified here to produce the records of how many American citizens were murdered by noncitizen illegal immigrants in this country. When we add up the cost to American citizens' lives of loopholes in our policy, it will be staggering. And we will have these numbers at some point as we proceed with this investigation in a broad view of the immigration issues.

So I see this as a piece to that puzzle, and we have a constitutional obligation to provide safety to the American people. There are many things we do in this Congress that we do not have a constitutional obligation to do, and that is not one of them. So I look forward to hearing this testimony and am hopeful that we will be able to in this Congress craft a policy that protects the people in this country and provides justice for those who are in this country legally as well as those who are innocent of crimes from other countries.

Thank you, Mr. Chairman, and I yield back.

Mr. HOSTETTLER. I thank the gentleman for his opening statement.

And for the record, I spoke in my opening statement of two individuals who we know have been—had been released as a result of Convention Against Torture relief; one of those men from Uzbekistan, another gentleman from Gambia. I failed to mention in my opening statement that while the Uzbecki gentleman is still in the country, the gentleman from Gambia, actually, for whatever reason, missed his home and voluntarily removed himself from the United States and returned to Gambia, even though he believed and attested to the fact that he was going to be tortured if he was removed from this country by the United States Government.

Mr. KING. Would the gentleman yield?

Mr. HOSTETTLER. Yes.

Mr. KING. Thank you, Mr. Chairman. I appreciate that clarification, and I was incorrect in my statement. And I know we have asked for information on any number of American citizens who have been murdered by this group of people in question here today. Do we have any evidence that that has not taken place?

Mr. HOSTETTLER. It is not my—not to my knowledge.

Mr. KING. I just point out that the final numbers on that are pending and we have asked for that information. It is not available before this Committee.

Thank you, Mr. Chairman. I appreciate it.

Mr. HOSTETTLER. Yes. The Chair now wishes to introduce our panel, and the Chair wishes to thank you for your attendance today and your willingness to testify before us.

Stewart Verdery was confirmed last month as the first Assistant Secretary for Homeland Security for Border and Transportation Security Policy and Planning. Prior to joining the Department of Homeland Security, Mr. Verdery was the senior legislative counsel for the Government Affairs and Public Policy Office; representing Vivendi Universal Entertainment, Universal Music Group, and Vivendi Universal in Washington, D.C. before that. The Assistant Secretary was general counsel to U.S. Senate assistant Republican leader Don Nickles, counsel to two Senate Committees and to Senator John Warner. He graduated cum laude from Williams College and received his law degree from the University of Virginia School of Law.

Eli Rosenbaum is Director of the Office of Special Investigations, or OSI, in the Justice Department's criminal division. He has worked as a prosecutor and investigator of Nazi criminals at the U.S. Department of Justice for over 15 years. CBS Radio Boston has termed him, quote, the man the Nazis fear most, end quote. Besides working at the OSI, Mr. Rosenbaum has been a corporate litigator with a Manhattan law firm and was appointed general counsel of the World Jewish Congress in 1985, where he directed the investigation that resulted in the worldwide exposure of the Nazi past of former United Nations Secretary General and Austrian President Kurt Waldheim. Mr. Rosenbaum graduated from the Wharton School of the University of Pennsylvania and Harvard Law School.

Dan Stein is the Executive Director of the Federation for American Immigration Reform. He is an attorney who has worked for nearly 21 years in the field of immigration law and reform. Prior to leading FAIR, Mr. Stein was Executive Director of the Immigration Reform Law Institute, a public interest litigation group that represented a variety of organizations in immigration and administrative law matters. He has also been in private law practice in real estate, Federal agency litigation, criminal law and tax-exempt corporate law. Mr. Stein is a graduate of Indiana University and the Catholic University School of Law.

Regina Germain has been a fellow at Georgetown University Law Center for the past 2 years where she teaches asylum and refugee law, including relief under the Convention Against Torture, to clinical law students who represent asylum seekers in immigration court. She serves on the National Asylum Committee Board of the American Immigration Lawyers Association.

Prior to her position at Georgetown, Ms. Germain was the senior legal counselor in the Washington office of the United Nations High Commissioner for Refugees. She graduated magna cum laude from University of Pittsburgh Law School, and cum laude from Georgetown University School in Foreign Service with a bachelor of science in foreign service. She is currently pursuing her master's of law degree in advocacy from Georgetown University Law Center.

Once again, I thank the panelists for being here today. Without objection, your written statements will be inserted in the record. You each will have 5 minutes to give an opening statement. We

would appreciate that you stay as close to that 5 minutes as possible.

And Mr. Verdery, the floor is yours.

STATEMENT OF C. STEWART VERDERY, ASSISTANT SECRETARY FOR POLICY AND PLANNING, BORDER AND TRANSPORTATION SECURITY DIRECTORATE

Mr. VERDERY. Thank you, Mr. Chairman, and Members of the Subcommittee. As you mentioned, my name is Stewart Verdery. I am Assistant Secretary for Border and Transportation Security Policy at the Department of Homeland Security. It is a pleasure to be back before the Committee again.

Thank you for inviting me to speak about the Torture Convention and its interaction with the more general issue of detention authority after the Supreme Court's 2001 decision in *Zadvydas*. Beginning in the 1970's, the United States championed the development of an international pact to eradicate torture. The Torture Convention was the product of the international communities to resolve—to combat this most extreme human rights violation.

Because torture is so horrific and universally condemned, the convention signatories agreed to refrain from removing or extraditing any individual to a country in which it was more likely than not that he or she would be tortured regardless of the existence of any ground that would otherwise warrant removal or extradition.

While urging appropriate constraints on this application, Congress, and specifically the Senate, recognized the absolute nature of this obligation when it enacted legislation in 1998 directing the Attorney General to promulgate regulations to implement the convention.

In section 2242(C) of the 1998 Foreign Affairs Reform and Restructuring Act, Congress provided that the regulations shall incorporate the bars to withholding a removal, quote, to the maximum extent consistent with our international obligations under the convention, end quote.

Just 2 weeks ago, President Bush reaffirmed the United States' commitment to combat torture. On June 26, the UN International Day in Support of Victims of Torture, the President declared, quote, the United States is committed to the worldwide elimination of torture, and we are leading this fight by example. With this laudable goal in mind, it is important to frame this discussion of the Torture Convention in the larger context of the release of criminal aliens generally following the *Zadvydas* decision.

In that case the Supreme Court held that post order detention is permissible when removal is reasonably foreseeable or when there are special circumstances that justify continued detention. The Court observed that once an order of removal is administratively final, the alien's detention is, quote, presumptively reasonable, end quote, for up to 6 months in order to accomplish removal.

Thereafter, however, if the alien provides, quote, good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, end quote, the Government must rebut the alien's showing in order to continue the alien in detention.

Now, the Court did suggest there are circumstances involving particularly dangerous individuals, terrorists or others whose spe-

cial circumstances could warrant continued detention. In general, however, when an alien is granted protection and cannot be removed to a third country, that alien's release may be ultimately required.

After *Zadvydas*, the Justice Department revised existing post order custody review regulations to account for the likelihood of the alien's removal and to—for special circumstances where the United States may properly maintain custody of an alien who cannot be removed. These regulations apply equally to any deportable alien who cannot be removed, including those granted protection under this convention.

However, combined with this *Zadvydas* ruling, it is clear that the United States determination to, quote, lead by example, end quote, in the hearing of the Torture Convention creates tension with the Government's efforts to promote public safety. The regulatory exception in allowing continued detention does not apply to many criminal aliens. For example, narcotics traffickers or violent criminals who have demonstrated—I am sorry, have not demonstrated mental disease or defect would not generally fall under the *Zadvydas* exception, nor would human rights abusers. Thus, *Zadvydas* has limited the Government's ability to maintain custody of certain aliens who cannot be removed.

However, the number of Torture Convention grantees with criminal histories that have been released under *Zadvydas* should be viewed in the context of the large impact that that case—sorry, of that case, and the longstanding difficulties that the United States has had in removing certain groups of aliens.

During the 3 years that the torture regulations have been in effect, only a small number of persons have been granted torture protection. This fact demonstrates that there has been a very measured and careful approach to adjudicating Torture Convention cases. We attribute these relatively low numbers to the strict eligibility requirements set forth in the regulations and to the diligence of Department of Homeland Security attorneys and Department of Justice adjudicators to assure that those regulatory requirements are applied accurately. It is my understanding that less than 3 percent of applications for Torture Convention application are ultimately successful.

Secondly, only a small portion of Torture Convention grantees are criminals or security threats. Of approximately 558 torture grantees in fiscal year 2002, less than 15 percent were granted deferral of removal, a more limited form of torture protection afforded to persons who would otherwise be subject to criminal or security-related bars.

Third, Torture Convention grantees comprise less than 1 percent of the total criminal aliens who since 1999 have been released from custody following a final order of removal. Between fiscal year 1999 and 2002, some 45,000 criminal aliens were released from INS or DHS custody. Of this total, only 490, about 1 percent, were Torture Convention grantees. The remaining 99 percent had final orders removal that could not be executed, not because of a treaty-based legal impediment such as the Torture Convention but largely because their respective countries of nationality were not willing to accept repatriation. In fact, a significant percentage of criminal

Torture Convention grantees are nationals of a country that did not readily accept the return of its nationals and would be difficult to return even in the absence of the treaty. Cuba is one such country.

Now, *Zadvydas* undeniably limits our ability to detain criminal aliens who have final orders of removal, but erecting criminal- or security-related bars to Torture Convention protection or otherwise limiting the applicability of the convention would place the United States in violation of its international obligations with minimal impact on the larger problem of criminal aliens remaining in the United States.

The Department of Homeland Security is committed to ensuring the proper balance between our convention obligations and our mission to make our communities safe within the limits imposed by *Zadvydas*. We will continue to work creatively in applying the convention, to minimize to the greatest extent possible any negative effects on public safety. In doing so, we will fulfill the President's declaration that, quote, the United States is committed to the worldwide elimination of torture, and we are leading this fight by example.

I thank you again for allowing me to offer these comments and look forward to any questions you might have. Thank you.

Mr. HOSTETTLER. Thank you, Mr. Verdery. And it is good to see you back before this Subcommittee.

[The prepared statement of Mr. Verdery follows:]

PREPARED STATEMENT OF C. STEWART VERDERY

Mr. Chairman and Members of the Subcommittee, my name is Stewart Verdery. I am the Assistant Secretary for the Border and Transportation Security Policy within the Department of Homeland Security (DHS). Thank you for inviting me to speak on developments in the implementation of our obligations under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), particularly with respect to the removal of criminal aliens.

Recently, this Administration reaffirmed the United States' commitment to prevent torture worldwide, a commitment that includes our obligations not to return an individual to a place where he or she is more likely than not to face torture. On June 26, 2003, the United Nations International Day in Support of Victims of Torture, President Bush declared that "[t]he United States is committed to the worldwide elimination of torture and we are leading this fight by example." [1] The Department of Homeland Security is dedicated to this mission but also recognizes the importance of ensuring that this benefit is given to those that truly warrant such protection and is not used as a mechanism to thwart what otherwise would be an appropriate removal. It is the Department's challenge to ensure that this Convention is being applied properly, thereby maintaining integrity in our immigration system while protecting individuals from heinous acts of torture. Further, it is the Department's challenge to ensure that the mechanisms to apply this Convention are appropriate and properly balance the need to protect individuals with the need to ensure the safety of our communities.

I wish to explore three aspects of our efforts to strike this balance. First, I will provide a framework for understanding the limited role of Convention Against Torture claims within the immigration system, including the most recent statistics and developments of the law regarding eligibility. Next, I will discuss tools available to ensure that we continue to meet our obligations under the Convention while minimizing the danger to the public. Finally, I will discuss the challenges arising from the Supreme Court's decision in *Zadvydas* v. *Davis*, particularly with respect to continued detention of certain aliens who receive Convention Against Torture protection. Taken as a whole, these issues demonstrate that fulfilling our international obligations under the Convention is generally not incompatible with robust efforts to remove criminal aliens from the United States.

[1] http://www.whitehouse.gov/news/releases/2003/06/print/20030626–3.html.

It is important to realize that the United States' determination to adhere to the Convention at times may pose a challenge to the Government's ability to protect the public. As detailed below, when an alien is granted protection and cannot be removed to a third country, that alien's release will generally be required under *Zadvydas*. The Court's decision in that case does not limit the ability of the government to detain aliens who are especially dangerous, such as terrorists, but does mean many serious criminals and human rights violators must be released if they cannot be removed. With that said, it is notable that criminal aliens who have received Convention Against Torture protection make up less than one percent of the criminal aliens who, since 1999, have been released from custody following a final order of removal.

CONVENTION AGAINST TORTURE FRAMEWORK

The Convention Against Torture represents an international commitment to protect individuals from the most extreme form of human rights violations. Because of the horrific practice of torture, the parties to the Convention agreed to refrain from removing individuals to a country in which it is more likely than not that they would face torture, regardless of the existence of any ground that would otherwise warrant removal. The United States championed the development of an international pact opposing the use of torture and was a leader in ensuring the ratification of the Convention Against Torture, which has been in effect for the United States since 1994.

Congress also recognized this obligation when it enacted legislation in 1998 implementing Article 3 of the Convention and directed the Attorney General to promulgate regulations implementing Convention protection.[2] That legislation also required that the regulations incorporate the bars to withholding of removal, to the extent consistent with international obligations, in the scheme for providing protection. Thus, Congress acknowledged that there was an absolute prohibition to removal, while still urging appropriate constraints on its application.

The current Convention Against Torture regulations, which have been in effect since March 22, 1999, meet this requirement through the use of a two-tier system of torture protection, modeled on the existing withholding of removal framework. An individual who does not qualify for asylum may nonetheless obtain withholding of removal based on fear of torture, so long as he or she has not committed a particularly serious crime, is not a persecutor, has not committed a serious non-political crime outside the United States, or is not a danger to the national security. Because of the absolute nature of the Convention, and the statutory requirement to act consistent with our international obligations, the regulations also provide for an extremely limited form of protection known as "deferral of removal" which offers protection to an individual otherwise barred from withholding. It is important to recognize that since there are no bars to deferral of removal under the Convention, serious criminals, persecutors, terrorists and human rights violators may qualify for protection. Further, as I will discuss later, the Supreme Court's *Zadvydas* ruling prevents the indefinite detention of certain aliens with final orders of removal. While terrorists and other especially dangerous individuals may be exempt from the ruling, *many other serious criminals and other threats to public safety must be released under Zadvydas.*

Claims for protection under the Convention Against Torture, in almost all cases, are adjudicated by immigration judges, with an appeal to the Board of Immigration Appeals (BIA). Although the Homeland Security Act transferred the functions of the former Immigration and Naturalization Service to the Department of Homeland Security, effective March 1, 2003, that law also provided that the Executive Office for Immigration Review (EOIR), including the immigration judges and the BIA, remains in the Department of Justice, under the authority of the Attorney General. The Bureau of Immigration and Customs Enforcement (BICE) attorneys represent DHS in these immigration proceedings before immigration judges and the BIA.

As a result of the strict standards articulated in the regulations, the number of individuals who have received withholding or deferral of removal based on the Convention Against Torture is small. In the four years since the regulations went into effect, the available data indicates that there have been approximately 1,700 grants of withholding or deferral of removal based on the Convention Against Torture. It is also important to emphasize that the number of criminal aliens who have received Convention Against Torture protection is small. Of the approximately 1,700 aliens who received withholding or deferral of removal under the Convention

[2] § 2242(a) of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105–277, Div. G, § 2242, 112 Stat. 2681–761, 2681–822.

Against Torture, 611 were aliens who were charged as removable because they had committed crimes. Notably, half of the 611 were given withholding of removal, which indicates that they could not have been subject to one of the criminal or security-related bars to withholding under the Act.

These statistics support our belief that there has been, overall, a very measured and careful approach to adjudicating Convention Against Torture cases. We attribute these relatively low numbers to the strict eligibility standards set forth in the regulations which place a heavy burden on the applicant to establish not only the likelihood of torture, which is itself narrowly defined, but that such harm would occur at the hands of or with the acquiescence of government officials. The Department of Homeland Security continues to monitor the development of case law in this area and to argue for a proper reading of the definitions and requirements set out in the regulations. Thus far, DHS believes that the immigration judges and the BIA have generally adhered to these strict requirements. There have been instances where DHS attorneys perceived too broad of an interpretation of the Convention by courts and successfully appealed to the BIA. Attorney General Ashcroft has decided in a series of cases that aliens must meet a heavy burden of proof, providing evidence that specifically establishes an individualized risk of the specific intent of government actors to engage or acquiesce in torture.[3] Moreover, the BIA has also generally read the Convention Against Torture requirements narrowly. For example, in *Matter of J-E-* the BIA held that there was no evidence to show that the substandard conditions of Haitian prisons equated with government sanctioned torture.[4] Thus, in the first four years of implementation we have found that the regulatory provisions have been narrowly construed, leading to a relatively small number of cases for which torture protection was granted.

TOOLS AVAILABLE TO ENSURE BALANCE IS MET

Because the obligation to refrain from removing an alien who faces torture is absolute, we have always been mindful of the fact that there would be situations where criminal aliens ineligible for other forms of immigration relief or protection might qualify for Convention protection. The Convention does not require that such aliens remain in the United States indefinitely and does not require that they be released from custody. The Convention Against Torture regulations provide a range of options for handling criminal and national security cases. An alien who has been given protection pursuant to the Convention Against Torture cannot be removed to the country where he would more likely than not face torture, but may be removed to a third country. If no third country will accept the alien, he may still be removed if the Secretary of Homeland Security credits assurances, received by the Secretary of State from the government of the country where the alien will be returned, that the alien will not be tortured.[5] While we reserve the use of diplomatic assurances for the most sensitive of cases, we have returned two individuals to their countries based on assurances that they would not be tortured. We continue to consider other cases as appropriate.

Moreover, the two-tiered system for granting torture protection ensures that those individuals who are ineligible for withholding of removal based on criminal or other acts receive the minimum amount of protection necessary to comply with our international obligations. Deferral of removal is a much narrower form of protection from removal than asylum, statutory withholding of removal, or even withholding of removal under the Convention Against Torture. Deferral does not confer any lawful or permanent immigration status on the alien and the alien may be removed to another country at any time. Deferral of removal is also subject to an expeditious method of termination in the case of changed conditions affecting the alien's likelihood of torture. Upon the submission by BICE of evidence relevant to the possibility of torture an Immigration Judge must hold a hearing in which the burden is on the alien to establish anew that he or she continues to face torture upon return. We are currently reviewing cases from several countries in which recent changes in conditions may affect the likelihood of torture. The Department's commitment to safeguard our communities requires that we take an aggressive review of these cases involving criminal aliens to determine whether we can remove any of these individuals while abiding with our Convention obligations. We anticipate that the termination process will allow us to remove protection when it is no longer warranted.

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[3] *Matter of Y-L-, A-G-, R-S-R-,* 23 I&N Dec. 270 (A.G. 2002).
[4] *Matter of J-E-,* 23 I&N Dec. 291 (BIA 2002)
[5] 8 CFR 1208.18(c)

IMPACT OF *ZADVYDAS*

Zadvydas has limited our ability to detain certain aliens who have orders of removal. During the statutory removal period, detention is mandatory for certain criminal aliens and terrorists.[6] Upon expiration of the statutory removal period, the Department has discretionary authority to continue to detain certain aliens subject to an administratively final order.[7] Anticipating the potential conflict between security concerns and a grant of protection under the Convention, Congress specifically noted in the legislation implementing Article 3 that the existence of torture protection should not be read to limit the Government's detention authority.

Nonetheless, the possibility of continued detention for most individuals granted deferral has been affected by *Zadvydas*, a decision issued by the Supreme Court subsequent to promulgation of the Convention Against Torture regulations. The Supreme Court held that detention is permissible under section 241(a)(6) of the Immigration and Nationality Act when removal is reasonably foreseeable, or when there are special circumstances that justify continued detention. Once an order of removal is administratively final, the Court found that the alien's detention is "presumptively reasonable" for up to six months in order to accomplish removal. Thereafter, if the alien provides "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the government must rebut the alien's showing or establish special circumstances in order to continue to hold the alien in detention.

After the Supreme Court's *Zadvydas* decision, the existing post-order custody review regulations that provide for automatic and periodic review for aliens who remain in detention upon expiration of the statutory removal period were revised and supplemented. The new regulations added provisions governing custody review and determination of the likelihood of the alien's removal. Under the provisions of 8 C.F.R. 241.13, custody reviews are initiated by the alien's request for release, accompanied by his assertion and support for his belief that his removal cannot be effected in the reasonably foreseeable future. Such reviews are conducted only after the six-month period of "presumptively reasonable" detention has expired. A specially trained Headquarters Unit of BICE's Office of Detention and Removal conducts the review procedures. In order to be considered for release or parole, the alien must first demonstrate that he has fulfilled his statutory obligation to make a good faith effort to secure a travel document. Upon consideration of all the evidence, BICE issues a written decision either continuing detention or ordering the alien released. BICE will release or parole the alien under specified conditions of release if it determines that the alien has complied with his statutory obligation to obtain travel documents, but despite the alien's and the government's best efforts, his or her release is not reasonably foreseeable.

This process applies equally to any deportable alien who cannot be removed, including those granted withholding or deferral of removal. It should be noted, however, that the 6th and 9th Circuits Courts of Appeals have expanded the *Zadvydas* decision to include inadmissible aliens; that is, aliens who have not gained initial admission into the United States.[8] Consequently, in all but the most serious cases, a criminal alien who cannot be returned—regardless of the reason—may be subject to release after six months. In such cases, BICE must rely upon conditions of release to appropriately monitor those released.

The *Zadvydas* court suggested, however, that there are circumstances involving particularly dangerous individuals, terrorists, or others whose special circumstances could warrant continued detention. This is reflected in the post order custody regulations. The regulations authorizes the Government to continue to detain aliens-even where their removal is not foreseeable—who present foreign policy concerns or national security and terrorism concerns, as well as individuals who are specially dangerous due to a mental condition or personality disorder, even though their removal is not likely in the reasonably foreseeable future. For instance, terrorists may be detained under the provisions of 8 C.F.R. 241.14(d) regardless of whether the final removal order is based on terrorist activity. Decisions to continue detention in such cases, however, must be based on information indicating that the alien's release would pose a significant threat to the national security or a significant risk of terrorism that cannot be adequately addressed through conditions of release. Similarly, 8 C.F.R. 241.14(g) allows DHS to seek approval from an immigration judge for the continued detention of individuals who are likely to engage in future

[6] INA § 241(a)(2), 8 USC § 1231 (a)(2)
[7] INA § 241(a)(6), 8 USC § 1231 (a)(6)
[8] *See Rosales-Garcia* v. *Holland,* 322 F.3d 386 (6th Cir. 2003), *cert denied*, 2003 WL 1878569 (June 23, 2003); *Xi* v. *INS*, 298 F.3d 832 (9th Cir. 2002).

acts of violence due to a mental condition or personality disorder, where there are no conditions of release that can reasonably be expected to ensure the safety of the public and such individual is likely to engage in future acts of violence. However, the operation of the regulation generally relies on psychiatric evidence attesting to mental conditions and requiring predictions based on past conduct.

In addition, the exception for continued detention does not apply to many who could endanger the public. For example narcotics traffickers or even violent criminals who have no demonstrated mental disease or defect would not generally fall under a *Zadvydas* exception. Furthermore, persecutors or human rights abusers would generally not fall under the *Zadvydas* exceptions, thus there are instances where the government is forced to release aliens who have final orders of removal, though they may pose grave threats to the public.

Thus, *Zadvydas* has limited DHS' ability to maintain custody of certain aliens who have been granted Convention Against Torture protection and cannot be removed, but may pose a danger to the community. Though statistically this group amounts to less than one percent of criminal aliens who have been released under a final order since 1999, the group is of significant concern to DHS. This is especially true in light of Congress's intent to preserve the Government's custody authority over aliens granted Convention Against Torture protection, as expressed in its 1998 legislation implementing Article 3 of the Convention.

There is little question that enforcing the United States' Convention Against Torture obligations while ensuring the public safety is a challenge, but such challenges are inherent in balancing the interests of a free and open society. The Department of Homeland Security is committed to ensuring the proper balance between our Convention obligations and our mission to make our communities safe, within the limits imposed by *Zadvydas*. The Department will continue to argue before immigration judges and the BIA and the Department of Justice will continue to argue before the federal courts for the proper application of the Convention to ensure that we meet our obligations. While we have seen many positive signs during the short period of time in which the Convention was implemented, we will continue to monitor the Convention's application to ensure that the proper balance between protection and safety is being achieved.

Thank you again for allowing me to offer these comments. I look forward to your questions.

Mr. HOSTETTLER. Mr. Rosenbaum, you are recognized for 5 minutes.

STATEMENT OF ELI ROSENBAUM, DIRECTOR, OFFICE OF SPECIAL INVESTIGATIONS, U.S. DEPARTMENT OF JUSTICE

Mr. ROSENBAUM. Thank you. Chairman Hostettler, Ranking Member Jackson Lee, and Members of the Subcommittee, I am pleased to accept Chairman Sensenbrenner's invitation to appear before you today to address two questions concerning the application of the Torture Convention to foreign nationals who have participated in war crimes, torture, and other human rights violations prior to arriving in the United States.

If I may say, it is a particular pleasure to be here, since our office which was created in 1979 was created largely at the behest of this Subcommittee. It has been 23 years—24 years, and I hope that the Subcommittee feels that its child has grown up properly.

I would like to preface my statement by noting the Administration's commitment to the Torture Convention, a noble international undertaking to protect human life and human dignity. As Mr. Verdery noted, just 2 weeks ago the President urged all governments to join with the United States in prohibiting, investigating, and prosecuting all acts of torture.

I would also note that my office, the Office of Special Investigations, which handles the World War II cases, has had only limited experience with the Torture Convention. Since my office's creation in 1979, we have won the denaturalization of 71 Nazi persecutors

and we have accomplished the removal to date of 57 such persons. With the assistance of the former Immigration and Naturalization Service, now in effect part of the Department of Homeland Security, OSI has prevented more than 160 Axis persecutors—both European and Japanese perpetrators—from entering the United States. We have 20 of these World War II cases currently in litigation in courts throughout the United States.

To date, however, only one OSI respondent has filed a claim under the Torture Convention. OSI attorneys have litigated some of the most complex immigration cases handled by the Government, all of which involve allegations that the defendant assisted in Nazi-sponsored acts of persecution—in human rights violations, if you will. Based on that experience, I believe that we can offer a useful perspective on the issues that CAT can raise when the Government seeks to remove persons who participated in war crimes, torture, and other human rights abuses.

First, the bar on removal made possible through domestic implementation of the Torture Convention is a stronger protection than earlier provisions of U.S. immigration law. The laws dealing with political asylum and withholding of removal, for example, provide that certain malefactors are statutorily barred from eligibility, including persons who assisted in persecution, persons who committed serious crimes outside the United States, persons who have been convicted in this country of serious crimes, and persons who are considered a danger to United States national security.

Moreover, persons who are found to be removable on grounds that they assisted in Nazi persecution—the cases my office handles—those persons are automatically barred from virtually all forms of relief or protection from removal available under the Immigration and Nationality Act.

In contrast, of course, there are no exceptions to protection from removal under the Torture Convention. A person who has committed the most heinous acts, including Nazi crimes and acts of terrorism, or a person who constitutes a grave danger to the national security of the United States is eligible for protection under the Convention Against Torture if that individual can prove—and the burden is on that individual—prove that he or she will more likely than not be tortured in the designated destination country. The strong policy reflected in the implementation of the Torture Convention is that no person, regardless of his or her past conduct, should be deported to another country to face torture.

Second, while CAT claims have been exceedingly rare in the World War II cases to date—as I said, we have seen just one—the situation is likely to be different with removal actions involving so-called modern-day human rights violators, the subject of the legislation that was referenced in the letter of invitation. The majority of my office's cases were litigated before protection under the Torture Convention was available under U.S. law, and recent OSI defendants have generally refrained from filing CAT claims, presumably because the Government is, after all, seeking to remove them to countries in Europe—countries that are signatories to the Torture Convention, and where torture is prohibited and generally quite rare.

However, some modern-day human rights violators are likely to be nationals of countries that are politically unstable, where torture is more likely to be used and legal protections against torture are not always available. Under those circumstances, some modern-day human rights violators may be able to put forward a colorable claim of prospective torture.

Third and finally, one can expect that alleged human rights violators will file frivolous claims under the Torture Convention for purposes of delaying their ultimate removal from the United States. Meritless claims and arguments are routinely advanced in removal proceedings by aliens who have little or no prospect of avoiding removal. This has been true in removal cases generally, and it has certainly been true in OSI's World War II cases. Obviously, it takes time to litigate these frivolous claims, a process that delays the removal of the aliens.

The Government's experience suggests that while CAT claims are likely to be filed in many removal cases brought against torturers and other human rights abusers, most such claims will fail. As Mr. Verdery mentioned, in fiscal 2002, immigration judges adjudicated 17,302 CAT claims, of which only 558, or just over 3 percent, were granted. However, 75 of these aliens were granted CAT-based deferral of removal after being judged ineligible for withholding of deportation on one of the four grounds that I mentioned a moment ago.

I would like to thank the Subcommittee for the opportunity to present this testimony, and I would be pleased to respond to any questions that the Subcommittee may have.

Mr. HOSTETTLER. Thank you, Mr. Rosenbaum.

[The prepared statement of Mr. Rosenbaum follows:]

PREPARED STATEMENT OF ELI ROSENBAUM

Chairman Hostettler, Ranking Member Jackson Lee, and Members of the Subcommittee, I am pleased to have the opportunity to appear before you today concerning the application of the United Nations Convention Against Torture or Other Cruel, Inhumane, or Degrading Treatment or Punishment (commonly known as the Convention Against Torture ("CAT")) to foreign nationals who have participated in war crimes, torture, and other human rights violations prior to arriving in the United States.

My name is Eli M. Rosenbaum, and I am the Director of the Office of Special Investigations (OSI) in the Justice Department's Criminal Division.

I would like to preface my statement by noting the Administration's commitment to the Torture Convention. On June 26, 2003, United Nations International Day in Support of Victims of Torture, the United States joined in global commemorations of the date in 1987 when the CAT came into force, and President Bush urged all governments "to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all acts of torture and in undertaking to prevent other cruel and unusual punishment." The Department of Justice echoes this commitment.

I would also note that OSI has had only limited experience with the Torture Convention. As the Subcommittee is aware, OSI was created in 1979 and was charged by the Attorney General with the task of investigating and taking legal action to denaturalize and deport persons who participated in acts of persecution sponsored by Nazi Germany or its allies during World War II. The unit's creation was largely a response to Congressional dissatisfaction with the Government's performance in the Nazi cases, nearly all of which had been lost in the courts, with the result that just two Nazi criminals had been removed from the United States in the three-and-a-half decades immediately following the end of World War II. Over the past 24 years, OSI has won the denaturalization of 71 Nazi persecutors and has accomplished the removal of 57 such persons. Twenty Nazi cases are before the courts at this time. Through a border control watchlist program, OSI, with the assistance of

personnel of the Immigration and Naturalization Service, now serving with the Department of Homeland Security, has prevented more than 160 suspected Axis persecutors from entering the United States. To date, however, only one OSI respondent has filed a claim under the Torture Convention. That application was denied by an immigration judge earlier this year—without a hearing—and the case is currently on appeal.

Notwithstanding OSI's limited experience to date with CAT, I believe that we can offer a useful perspective on the difficulties involved in obtaining the removal of persons who participated in war crimes, torture, and other abuses. OSI's prosecutors have litigated some of the most complex immigration cases handled by the Justice Department over the past two decades, and all of OSI's cases have required the Government to prove, by clear and convincing evidence, the respondent's participation in Nazi crimes against humanity, specifically in acts of persecution committed against Jewish civilians and other victims during World War II. Based in part on that experience, I can offer several observations.

First, the Convention Against Torture, as ratified and implemented, does not contain the bars to relief applicable to asylum and statutory withholding of removal. The statutes dealing with political asylum and withholding of removal, for example, provide that certain malefactors are statutorily barred from eligibility, including persons who assisted in persecution, persons who have committed serious crimes outside the United States, and persons who are considered a danger to United States national security. The Convention Against Torture, as a mandatory form of relief, does not exclude these malefactors.

When Congress enacted the Holtzman Amendment in 1979 to provide for the exclusion and deportation of persons who had assisted in Axis-sponsored persecution, it provided that such persons were automatically barred from virtually all forms of relief or protection from removal available under the Immigration and Nationality Act, including asylum, withholding of removal, suspension of deportation, and cancellation of removal. Thus, OSI's cases have very rarely involved the litigation of any claim for relief or protection from removal.

In contrast, there are no mandatory bars to protection under the Convention Against Torture. A person who has committed the most heinous acts—including Nazi crimes and acts of terrorism—or a person who constitutes a grave danger to the national security of the United States, is nonetheless eligible for protection under the Convention Against Torture if that individual can prove that he or she is "more likely than not" to be tortured in the designated destination country.

Second, while claims have been rare in the World War II cases to date, the situation is likely to be different with removal actions involving "modern-day" human rights violators. The Convention Against Torture did not enter into force with respect to the United States until November 20, 1994, and the pertinent provisions of Article 3 were not implemented in United States law until 1999. Thus, the majority of OSI's cases were litigated before protection under the Convention was available.

Defendants in recent OSI cases have generally refrained from filing CAT claims, presumably because the Government has sought their removal to countries in Europe that are signatories to the Convention and where torture is prohibited and rare, and where there is simply no credible reason to believe that any of those countries would inflict torture as punishment for actions taken on behalf of a long-defunct regime with which they either never clashed or with which they were last at war more than five decades ago. In contrast, some "modern-day" human rights violators are likely to be nationals of countries that are politically unstable, where torture is likely to be used and legal protections against torture are not available. These cases are, of course, handled by the Department of Homeland Security before the immigration judges and the Board of Immigration Appeals, and are litigated before the courts of the United States by the Civil Division's Office of Immigration Litigation.

Under those circumstances, some "modern-day" human rights violators may be able to put forward at least a colorable claim of prospective torture, and it will not be possible for an immigration judge to dismiss the claim without a hearing (as was done in the OSI case I mentioned earlier), particularly if the respondent is a national of a country in which one persecutory regime has been replaced by another set of inhumane leaders.

Third, one can expect that many alleged human rights violators will file frivolous claims under CAT for the purpose of delaying their ultimate removal from the United States. Meritless claims or arguments are routinely advanced in removal proceedings by aliens who have little or no prospect of avoiding removal. This has been true in removal cases generally, and it has certainly been true in OSI's cases. In our time-sensitive efforts to denaturalize and remove Nazi persecutors, OSI attor-

neys regularly must defend against frivolous challenges to the court's jurisdiction and respond to long-discredited legal defenses and arguments.

However, the Government's experience suggests that CAT claims are likely to be filed in many removal cases brought against torturers and other human rights abusers. In FY 2002, immigration judges adjudicated 17,302 CAT claims, of which 558, or just over 3 percent, were granted. Seventy-five of these aliens were granted CAT-based deferral of removal after being adjudged ineligible for withholding of deportation.

I would like to thank the Subcommittee for the opportunity to present this testimony, and I would be pleased to respond to any questions that the Subcommittee may have.

Mr. HOSTETTLER. Mr. Stein.

STATEMENT OF DAN STEIN, EXECUTIVE DIRECTOR, THE FEDERATION FOR AMERICAN IMMIGRATION REFORM

Mr. STEIN. Mr. Chairman, Ranking Member Sheila Jackson Lee, thank you very much for the opportunity to be here. We appreciate very much your leadership in holding this important hearing on what has got to be, in my over 40 times being invited to testify before this Committee, the most challenging set of conflicting and competing interests in the delicate—most delicate matters one could ever imagine.

FAIR naturally supports strong immigration controls. That is what we are all about. At the same time, we as an organization oppose terrorism and support the intentions and principles of the Convention Against Torture. Nevertheless, at the time the convention was adopted by the United States, the U.S. asylum system was overloaded and overburdened, and we do not believe that it was contemplated that the convention itself would provide an entirely separate and new avenue for would-be asylum claimants or would-be deportees to seek an exemption from removal.

And when the regulations were coerced, if you will, out of the Administration some years back, they set up a whole new set of standards which appear to be operating independently from any determinations made in the asylum proceeding, including adverse credibility determinations, which give us some concern about where exactly this is going. With the understanding that no one wants to see anyone sent back to torture of any kind, we are concerned that the actual rigid standards of the convention not only provide requirements that we have succor—provide succor or protection for Nazi war criminals, people who have committed mass murder, the gravest crimes against humanity, but at the same time actually inadvertently facilitate the actions of international criminal syndicates in organized crime operations that work in conjunction with host governments.

So the couple of—two cases I want to just talk about very briefly in my testimony here is the Zheng case which came out of the Ninth Circuit a few weeks ago. The Ninth Circuit remanded back to the BIA, holding that this alien was eligible for CAT relief. Now, this claimant had actually been smuggled into this country by snakeheads. His allegation was that because he provided testimony to U.S. authorities to prosecute some of the smugglers, he would be tortured if sent back to China under the standard of official acquiescence, making the claim that the very loose-knit corruption that exists between local officials in Fujian Province and the smugglers gave rise to a very loose standard of proof that the alien had

to meet to show that there was actual official acquiescence. Which we believe is far less rigid than what is applied by the standards of the treaty that there be some kind of approval in this acquiescence, that there be some greater nexus between the actual action of the private parties and what can be considered state actors.

So already the Ninth Circuit is widening dramatically the standards for what constitutes official torture, to include just about anybody who is being smuggled in through sophisticated organized crime syndicates that are Mafia-like in their organizations, that may also have interaction or collusion with official governments of one kind or another. Even in the most informal way.

The second case I would like to bring to your attention is not a public case. It was decided by the Board of Immigration Appeals October 25 in 2001. The case is a matter of Hamadi, In Re Hamadi. Hamadi was found to be an active member of the Mujaheedin, of the MEK. He was found not only to have committed and participated in a variety of acts associated with bombing embassies, et cetera, overseas; he was also formally determined to be a threat to U.S. national security by the Board of Immigration Appeals. He was given deferral of removal under the CAT convention and, so far as I know, is probably still in custody.

Now, Mr. Chairman and Members of the Committee, when the CAT Convention was considered and negotiated, everyone assumed that the U.S. authority to detain undesirable aliens, or aliens deemed a threat to human rights and in other ways not desired to be released within the community, remained absolute owing to the long traditions of very high deference given to the executive branch in detaining removable or excludable aliens.

The *Zadvydas* case is a very troubling trend which we believe may continue as the Court reconsiders more of these cases, which if we do see erosion in the executive standards for detaining aliens, could mean that not only are we facilitating the undesirable operations of people who commit criminal operations and retaliate in organized crime syndicate-like fashion, we are actually allowing people to stay here who no one could possibly ever have intended for us to provide indefinite protection for.

So with that, I think I will end my—I have a variety of recommendations, which if I have time I could go through, but maybe we will do that during the Q and A.

Anyway just to close, I would like to say that this is an example of good intentions which sometimes have inadvertent consequences. Clearly the spirit of the intention of the convention is very important to protect. Nevertheless, based on past experience with these kinds of provisions, the way in which through various types of litigation, standards are loosened and relaxed beyond what anyone contemplated, we do believe the way the regulations are being interpreted now begins to become a real threat to public safety, and it is only a matter of time before somebody is released who is given CAT protection who we will regret was released for some time.

So thank you very much for the opportunity to testify, and maybe I will review my specific recommendations later.

Mr. HOSTETTLER. Thank you, Mr. Stein.

[The prepared statement of Mr. Stein follows:]

PREPARED STATEMENT OF DAN STEIN

Mr. Chairman and members of the subcommittee, thank you for the opportunity to present the views of the Federation for American Immigration Reform (FAIR) on the difficult issues pertaining to U.S. implementation of the Convention against Torture (CAT). FAIR is a national, not-for-profit organization of concerned citizens nationwide promoting better immigration controls and substantial reductions in overall immigration for the benefit of all Americans. FAIR does not receive any federal grants, contracts or subcontracts. My name is Dan Stein, and I am FAIR's Executive Director.

Our interest in today's hearing relate to our concern that U.S. law promote substantial justice in its implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As a general proposition, our organization supports the intentions and goals of the Convention against Torture. This is an important treaty. Opposition to torture has long-standing support as part of our nation's founding principles as articulated in the Eighth Amendment to the Constitution of the United States. Nevertheless, even the best intentions can have unintended consequences. The United States has a well-developed system to entertain refugee and asylum claims. We cannot believe it was the intention of those drafting the convention to override the sovereign prerogative of any nation to rid itself of aliens judged a threat to public safety, security or the best interests of the nation.

Mr. Chairman, FAIR testified on September 28, 2000 before this committee raising a variety of concerns, many of which have been borne out by subsequent events. The CAT was signed by the United States in 1988 and became effective for this country March 22, 1999. We argued then, and continue to argue, that CAT was not designed to create a new avenue for immigration relief that would allow people to avoid consequences associated with past bad behavior—including serious human rights abuses, serious criminal activity, persecution, violations of religious freedom, offenses against humanity, terrorism, genocide and torture. This is what current regulations provide.

The Senate Report accompanying treaty ratification (Senate Report 101–30) (1990) stated CAT's purposes as a treaty. There is no mention of the nation creating a new right of action for those unsuccessful in obtaining asylum under U.S. law. Rather, the organic purpose of CAT is to create modifications to each nation's criminal law to eliminate torture (in our case here in the U.S.) and provide a legal recourse for those who have suffered torture at the hands of state actors.

Evidence for this proposition can be found in the fact that CAT has no provision for exclusion of criminals and other serious human rights violators from its protection. As now interpreted by immigration courts, the convention and its implementing rules override provisions that would cause their removal. This is probably because CAT was not intended to become part of any nation's domestic immigration law procedures. Prior to CAT—and FAIR believed during deliberations leading up to the treaty—the existing rules under INA § 241(b)(3) governing "withholding of removal" would cover torture claims while retaining ineligibility for those aliens who are aggravated felons or otherwise undesirable. We believe that was the prevailing view at the time. There was certainly no broad public debate while CAT was being deliberated in the Senate to suggest that this treaty would force a major rewrite of U.S. asylum and refugee law. I refer to my previous testimony for discussion of the deliberations leading to the current CAT regulations.

Proponents of existing regulations view the Torture Convention as creating an absolute bar to *refoulement* for anyone who makes a torture claim, even if the person operated a death camp in World War II, ordered the mass murder of millions or sought to destroy an entire people. While this continues to be their position, the definition of torture is persistently sought to be expanded to include a variety of private acts claimed to be state action via the tenuous route of asserting these private acts took place via the "consent or acquiescence" of a public official. (To support our claim that the standard for official "consent or acquiescence" is expanding, I refer to recent federal appellate court decisions that have begun to assert that Congress did, in fact, intend to prevent us from removing criminal aliens or serious human rights abusers; in a recent case by one who claims to have been threatened abroad with violence by mafias, who *the alien himself* had previously hired as smugglers—so long as the local police in the native country are alleged as "aware" of such threats and fail to provide protection (*Li Chen Zheng* v. *Ashcroft* No. 02–70193, 9th Cir. June 18, 2003). See also *Zubeda* v. *Ashcroft* (No. 02–2868, 3rd. Cir. June 23, 2003) [adverse credibility determinations in asylum claims do not prejudice CAT claims on same facts; country condition reports by "unofficial" organizations are probative evidence for CAT withholding of removal; no requirement to show specific in-

tent to inflict pain to qualify for CAT relief; grant of asylum is discretionary, but CAT relief is absolute and mandatory].

Proponents of the absolute bar to *refoulement* claim that under CAT, the U.S. can detain these aliens indefinitely and/or prosecute them here under the "universal jurisdiction" provisions of the treaty that allow courts to assert extraterritorial jurisdiction over the torture offender as long as the offender is physically present within a territory of the United States when he is served (18 U.S.C. 2430A). Our understanding is that this new criminal cause has been asserted rarely if ever by the Department of Justice. And a recent Supreme Court case mentioned below suggests there are constitutional limits on the detention of removable or excludable aliens.

Nevertheless, the Convention—whether intended or not—has created an entirely new vehicle for aliens to try to delay deportation. Torture claims now operate as another "bite at the apple" after asylum and withholding remedies have been exhausted. As I say, the organic purpose of CAT was to "make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world." (Convention Against Torture, Preamble, 23 I.L.M. 1027). A noble goal in the abstract, but in the implementation, the U.S. appears to have tied its hands in, we expect, unintended ways. The U.S. appears now to be unable to remove people who just about everyone would like to see removed.

The INS parenthetically mentioned this massive loophole when the proposed regulations for CAT were published on February 19, 1999 (Federal Register):

> "[T]here are some important differences between withholding of removal under section 241(b)(3) of the (Immigration and Nationality) Act and Article 3 of the Convention Against Torture. First, several categories of individuals, including persons who assisted in Nazi persecution or engaged in genocide, persons who have persecuted others, persons who have been convicted of particularly serious crimes, persons who are believed to have committed serious non-political crimes before arriving in the United States, and persons who pose a danger to the security of the United States, are ineligible for withholding of removal. See INA section 241(b)(3)(B). *Article 3 of the Convention Against Torture does not exclude such persons from its scope.*" (Emphasis added.)

To reiterate, we seriously doubt that the Senate, when it ratified CAT, intended to create a whole new category of immigration relief for those ineligible for asylum or withholding of deportation. For that reason we strongly support legislative efforts to correct the overly broad and abusive interpretation of CAT protection.

THE MAGNITUDE OF THE PROBLEM

Mr. Chairman, when we testified on the need to correct the misuse of the CAT protection in 2000, we indicated that we were concerned that INS interpretation had created a loophole that would allow an increasing number of serious human rights abusers and criminals to remain in the United States. Currently available data bears out that assessment.

Recent data from the Executive Office of Immigration Review (EOIR) records 683 cases between 1998–02 in which CAT protection was asserted for aliens found deportable in cases involving criminal charges. All these cases were sent to the Board of Immigration Appeals (BIA). Although these cases cannot be tracked with precision, it appears that only about 150 of these individuals have been removed and only about 30 are still detained, implying that around 500 of these otherwise removable aliens may have been released back into U.S. society. It goes without saying that the fact that these individuals were found removable and their cases involved criminal activities or human rights abuse means that the likelihood of danger to the American public is increased by the release of these aliens. I would point out that this is occurring just after a period when the Executive Branch had made deportation of criminal aliens its "highest" public enforcement priority.

Another problem with the CAT protections is that the claim can be asserted after other claims for relief have failed. Because this protection may be sought following the full consideration of protections for an alien in removal proceedings, including eligibility for asylum, it offers a subsequent opportunity to overturn or delay removal. This is attractive as a delaying tactic. Further, the lack of specificity regarding the scope of CAT protection has invited appeals to the BIA seeking CAT relief in cases of spousal abuse, genital mutilation, child abuse, etc. The United States does not and should not condone any of these practices, and yet these claims are reminiscent of "social status group" claims persistently made under asylum law. As much as we disapprove of these practices—indeed in some cases they shock our conscience—they do not involve state practices of torture and should be defined within the BIA appeal system by legislative clarifying language to discourage such claims.

Let's look more closely at how "torture" is defined: The language of Article I of the Convention is clear. Torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity* [emphasis added]. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." We are already seeing the definition of torture being expanded by the appellate courts while CAT claims are being considered as claims entirely separate from asylum claims from the same claimant.

The Senate, in consenting to the U.S. adoption of the Convention, expressed its understanding that, for an act to be performed with the "acquiescence" of a public official, the public official must "prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity." (136 Cong. Rec., supra note 4, at S17491–92.)

Demonstrating the type of cases that suggest the need for Congressional action are two in which the BIA granted CAT relief from removal to persons implicated in murders. In one, a Gambian national (*Matter of Kebbem*—BIA 2000), who had fled his country after murdering a man at a soccer game, was judged more likely than not to be tortured by government officials if he were returned to the Gambia on the basis of a State Department country report finding that the government had a reputation for physically abusing detainees held for political and security offenses. In another, an Uzbek national (*Matter of Gaziev/Gazieva*—BIA 2002) who was implicated in the 1994 Dendro Park shootout, a notorious public mass killings that left five dead in Uzbekistan, was also granted CAT protection. The BIA found that the lead respondent and his family would be more likely than not to be tortured to obtain confession regarding his involvement in the slayings. In the case of the Gambian, it appears from information provided by the Department of Homeland Security that he has since chosen to return voluntarily to Gambia, thereby belying his earlier assertion of fear of torture.

As is the case with many asylum claims, our concern persists over the methodology used for finding that an alien has a well-founded fear of persecution or torture: we have consistently called attention to the process's reliance on generic background information, like the State Department country reports and other documents often compiled by biased sources, rather than being based on objective documentary information or evidence.

There are limits to the utility of Country Condition reports. Experience with the return of Cubans to Cuba provides a reality check on such assessments. It was long alleged by advocates for admitting all Cubans who escaped the island that any Cubans returned to Cuba would be imprisoned and abused. Following the policy shift by the Clinton Administration in the mid-1990s to return Cubans intercepted at sea to Cuba, State Department officials and international organizations monitoring the status of returned Cubans established that the returned Cubans were not subjected to mistreatment. This demonstrates the gap between the rhetoric of possible persecution used to support a liberal admission policy and the practical reality revealed by experience. As in the case of asylum claims, it also exposes the very real risk of fraud.

Mr. Chairman, we believe Congress needs to intervene to further clarify the scope of remedies available under CAT. The Foreign Affairs Reform and Restructuring Act (FARRA) of 1998 implemented the so-called *"nonrefoulement"* provisions of the Convention Against Torture (8 U.S.C.S. § 1231 note). That legislation specifically called for the exclusion from CAT protection of criminal aliens and serious human rights abusers to the *maximum* extent consistent with the Senate's conditions on ratification of the Convention (FARRA § 2242(c)). The Secretary of Homeland Security is authorized to terminate deferral of removal under CAT upon receipt of diplomatic assurances obtained by the Secretary of State that the alien would not be tortured if removed, or if an immigration judge finds changed circumstances (8 C.F.R. 208.18(c), 208.17(d)).

Despite such clear direction from Congress that CAT be applied sparingly, restrictively, and so as to induce compliance with humanitarian norms by foreign states, we have seen the administrative agencies and the Ninth Circuit move recklessly to interpret the Convention in the broadest sense, as an immigration program for highly undesirable aliens, with no indication that grave and fully documented abuses of human rights have been reduced or discouraged in any way.

Building an increasingly expanding exemption from removal for illegal aliens, especially aliens involved in criminal activities, on a system where there is little if any objective criteria to guide informed decisions, as has been done with the CAT screening criteria, is unfair both to the adjudications system and to the American public. Most incomprehensibly, it rewards human smugglers, torturers, and other serious abusers, by encouraging the very traffic it purportedly was intended to curb.

CORRECTING THE PROBLEM

The option of continuing to detain removable aliens until such time as removal can be effectuated has been eroded by the 2001 U.S. Supreme Court ruling in *Zadvydas* v. *Davis* (533 U.S. 678), holding that removable aliens may not be held indefinitely. The erosion in the Attorney General's authority to detain removable aliens has changed the entire framework for analyzing the impact of CAT on our immigration rules. If the U.S. loses the option of indefinitely detaining criminals and human rights abusers, this country must make a more vigorous effort to remove these people quickly. There are two avenues by which Congress could restore protection to American society from the threat from foreign criminals who otherwise are likely to be released under the CAT provisions.

1. The CAT responsibilities assumed by the United States were not self-executing, as the Senate stipulated in its advice and consent, Congress thus has the authority for specifying the criteria for the CAT's implementation. It would be our preferred option for Congress to specify that CAT protections are not absolute, and do not apply to serious criminals and human rights abusers. More generally, we would like to see claims brought under CAT reintegrated within the asylum and withholding of removal process and considered within the same legal claim. Further, any adverse credibility determinations made during the asylum process should also operate to bar a CAT claim. In conjunction with this approach, the Department of State should be encouraged to obtain commitments from the home country that a returned alien will not be subject to torture, or to attempt to find safe third countries willing to allow the alien(s) to enter. Where torture claims are based on claims of official acquiescence in torture, the standard of proof must be raised and the nexus between state action and private actors must be better defined. Finally, the U.S. should bar general immigration from any country that refuses to guarantee the safety and security of their nationals returned from the United States.
2. To prevent the alien from being released back into American society, the United States could assume responsibility for obtaining evidence from the home country about the crimes committed by the individual and effecting prosecution in the United States for those crimes. This, although possible under The Torture Victims Protection Act (18 U.S.C. 2340A), would involve an onerous assumption of new investigatory and prosecutorial responsibilities for the U.S. government. The downside of this approach is that the U.S. taxpayer will be absorbing tremendous costs associated with prosecuting people for crimes not committed in this country or affecting citizens or nationals of the United States.

The trend in expanding the definition of who is a member of a "particular social group" and in adding new categories of beneficiaries, as was done by Sec. 601 of IIRAIRA, has already put an unfair and unmanageable burden on the asylum/CAT adjudication process.

Mr. Chairman, our view of the problems that have arisen under administration of the CAT protections has not changed from what we already saw as a troubling trend in 2000. As we said at that time, "For those who have been barred from relief by the aggravated felony rules, the CAT provides one more "bite at the apple." While many of those claims may have merit, our concern is that over time, advocates will work to broaden the CAT definitions to create an ever-widening set of immigration loopholes. This is based on plenty of experience in the field. We are concerned 1) that many aggravated felons will be successful in remaining in the country in ways never intended or foreseen under asylum law, and 2) that the CAT will become the basis for expanding the definition of "torture" in new and novel ways that will include virtually all forms of regressive cultural and domestic practices where it can be alleged there is no modern state compliance with Western norms of civil protections." Since 1999 we have witnessed just such an undesirable and troubling development in the legal definition of "acquiescence" to torture.

The subsequent events, court rulings and the new data cited above indicate that our earlier assessment was correct. If Congress does not act, it is clear that the

problem will expand further, that undesirable and dangerous aliens who illegally enter the United States will be harder to remove, that trafficking will become more violent, less risky, and more profitable, and that the American public will be placed at unnecessary risk.

Mr. Chairman, we encourage you and the members of this Subcommittee to initiate legislation that will limit the scope of CAT protection so that perpetrators of serious crimes and serious human rights abuse are brought to justice. At the same time, we urge that the scope of CAT protections be defined to clarify what is "state acquiescence": this term should be clarified to insure it does not include actions by private persons merely operating under a generalized condition of civil violence or organized criminal activity.

Mr. Chairman, this is an extremely difficult and challenging subject. We all want to be sensitive to the very real threats that exist for those who may be subject to some form of torture. As in all areas of public policy, this one requires a balancing of interests. FAIR works to assert the general interest of effective immigration controls, and I hope my testimony has adequately reflected that balance.

Thank you again for the opportunity to testify before the committee. I would be happy to answer any questions you or any other member of the subcommittee may have.

Mr. HOSTETTLER. Ms. Germain.

STATEMENT OF REGINA GERMAIN,
GEORGETOWN UNIVERSITY LAW CENTER

Ms. GERMAIN. Thank you, Chairman Hostettler and Ranking Member Jackson Lee and Members of the Committee. I very much appreciate the opportunity to testify before you today, and I am honored by this opportunity.

I appear before you today to defend a fundamental principle of human rights law, a principle that no human being should be or deserves to be tortured; not here, not anywhere. There are no exceptions. Torture can never be justified or condoned by the United States. It is a heinous act, and it is recognized as such by the world community. And in an effort to eliminate torture and prosecute torturers, over 150 countries of the world have signed the United Nations Convention Against Torture, including, of course, the United States.

Since the Convention Against Torture has been implemented in the United States, only a small number of individuals have benefitted from the protection. It is an extraordinary remedy, used only in the direst of circumstances, and according to the statistics issued by the Executive Office for Immigration Review, between 1999 and 2002, only 339 individuals who were found ineligible for asylum or withholding of removal because of criminal grounds have been found to be eligible for deferral of removal. So I am focusing on a different number than other—the Members of the Committee have, and other panelists, but I think the key number to look at in these statistics is the number 339.

It is not and has never been an avenue for permanent residency, the Convention Against Torture relief. Unlike asylum, individuals granted Convention Against Torture relief have no right to remain permanently in the U.S. In fact, I would say that deferral of removal under the Convention Against Torture is the most precarious and restricted immigration relief under the Immigration and Nationality Act, but it has saved lives and it has prevented torture.

This morning I would like to address five points regarding the Convention Against Torture relief for your consideration.

First and foremost, barring human rights abusers or serious criminals from protection under Article 3 would violate U.S. obligations under the convention. Article 3 contains no exceptions or limitations. The drafters of the Convention Against Torture—and the U.S. was involved in the actual drafting of the convention—the drafters in their foresight recognized that torture is an evil that can never be condoned. The Senate also acknowledged this fact by adding no understandings or reservations regarding possible exceptions to the nonreturn provision. And I would disagree with my fellow panelists that the Senate never considered the possibility that this would be a form of relief, because the Senate actually uses the same—imposed the same standard of review for Convention Against Torture relief that is used for withholding of removal. It used very similar language, more likely than not standards, so I would say that the Senate did consider that it would be another means of seeking relief within the U.S..

In passing implementing legislation in 1999, Congress also recognized that any restrictions or limitations on relief under the convention had to be consistent with U.S. obligations under the convention, and only, quote, to the maximum extent consistent with the obligations of the United States under the convention could the U.S. exclude from protection persons who would otherwise be barred from withholding of removal, such as individuals who committed serious crimes or people who are security risks to the U.S..

And I would agree with Mr. Verdery that existing laws and regulations do adequately protect the American public from human rights abusers and serious criminals who benefit from protection under the convention. As the Supreme Court recognized, noncitizens who cannot be removed from the United States may continue to be held in detention under special circumstances, and that is from the *Zadvydas* v. *Davis* case. The regulations promulgated after *Zadvydas* allowed for the detention of people who are—noncitizens who are detained on account of security- or terrorism-related grounds or determined to be especially dangerous, that is, individuals who have committed one or more crimes of violence and are likely to engage in violence in the future. Also, the USA PATRIOT Act allows for the Attorney General to detain suspected terrorists even if they are granted relief from removal.

The convention also allows individuals to be returned to a home country if the U.S. obtains diplomatic assurances from that country. And the U.S. has used it in at least one case, a case reported in the *Washington Post* of a Saudi Arabian who was involved in the Khobar Towers bombing that killed 19 U.S. Customs Service men, and the U.S. sought assurances from Saudi Arabia that the individual would not be tortured upon return, and removed the individual from Saudi Arabia to face trial and possible execution if he was found to be guilty.

It is unclear, however, whether the U.S. has a system in place to monitor whether diplomatic assurances actually prevent torture or whether the U.S. would seek the return of anyone who was subjected to torture despite diplomatic assurances.

My third point is that human rights abusers can and should be punished. The convention itself calls upon states to criminalize torture. We have a statute in our own country that criminalizes it,

and to prosecute torturers found within their territories. If the U.S. feels that it lacks jurisdiction, it could and should send these violators to another country or jurisdiction that would prosecute the person. Allowing them to be tortured instead of punished only compounds the atrocities that they have committed by condoning torture as a legitimate form of punishment. Victims of torture want justice. They do not want to perpetuate the use of torture.

Fourth, deferral of removal is an extraordinary form of relief available only to individuals who prove it is more likely than not. And I would disagree with Mr. Stein. I would say that convention has been interpreted narrowly by our courts. It is not available to individuals who only present isolated instances of torture in their home country, as the Board of Immigration Appeals has found. It is not available to individuals fearing harm that does not rise to the level of torture such as inhumane prison conditions.

In addition, torture at the hands of a nongovernment actor does not meet the convention's definition of torture unless the Government acquiesces, consents; and the Senate in its foresight has found that acquiescence means that you have to have knowledge that torture is going to take place and breach a duty to intervene.

And even when a person manages to obtain a grant of deferral, his status is a precarious one. It can be revoked in 10 days on new or even previously existing evidence. In a revocation hearing, the burden remains on the applicant to show that there continues to be a substantial risk of torture. And deferral only precludes the removal of the individual to the country where torture is likely, not to any other country.

Lastly, the Convention Against Torture has at times been a safety net for people whose crimes in the U.S. or abroad have been relatively minor. And during my time at the United Nations High Commissioner for Refugees here in Washington, we often came across a number of cases of individuals who should have been eligible for asylum relief, but for a minor crime were found ineligible, and the Convention Against Torture was their safety net.

In conclusion, I would urge you to continue the U.S.'s commitment to the principle that no human being should be or deserves to be tortured and to the U.S.'s commitment to eliminate torture worldwide. Thank you very much.

Mr. HOSTETTLER. Thank you, Ms. Germain.

[The prepared statement of Ms. Germain follows:]

PREPARED STATEMENT OF REGINA GERMAIN

Chairman Hostettler, Ranking Member Jackson Lee and Members of the Subcommittee:

Thank you for the opportunity to testify today. I am honored. I have been practicing asylum and refugee law since my graduation from law school in 1989. In my very first asylum case, a member of Congress from Erie, Pennsylvania was instrumental in assisting my client and her family in obtaining protection in the United States. That member of Congress was Tom Ridge, now Secretary of the Department of Homeland Security. Needless to say, I quickly learned the important role Congress plays in the asylum process. When I was Senior Legal Counselor for the United Nations High Commissioner for Refugees from 1995 to 2001, the bars to asylum were greatly expanded. As a result, UNHCR advocated for changes to existing law and assisted asylum-seekers barred by minor criminal offenses in seeking relief under the Convention Against Torture (CAT), even before implementing legislation was passed. I have closely followed the implementation of Convention Against Torture relief since that time. I am the author of an Asylum Primer, published by the

American Immigration Lawyers Association, which contains a comprehensive chapter on CAT relief. I am also a frequent presenter on the Convention Against Torture. During my recent fellowship at Georgetown University Law Center, I taught classes on asylum and the Convention Against Torture and advised students whose clients were seeking CAT relief, in addition to asylum.

I appear before you today to defend a fundamental principle of human rights law; the principle that no human being should be or deserves to be tortured. Not here, not anywhere. There are no exceptions. Torture can never be justified. It is a heinous act and recognized as such by the world community. In an effort to eliminate torture and prosecute torturers, over one hundred and fifty countries have signed the United Nations Convention Against Torture, including, of course, the United States. Last month, President Bush confirmed the U.S.'s continuing commitment to this principle when he stated: "The United States is committed to the world-wide elimination of torture and we are leading this fight by example." President George W. Bush (June 26, 2003).

The Convention Against Torture was signed by the United States on April 18, 1988, under the leadership of President Ronald Reagan. The Senate adopted its resolution of advice and consent to ratification on October 27, 1990 during the Presidency of George H. W. Bush. The treaty did not become effective until November 1994, one month after it was deposited for ratification with the United Nations Secretary General. In 1998, Congress enacted legislation to implementing Article 3, the non-return provision, of the Convention Against Torture without reservations. Regulations incorporating key provisions of the Convention, as well as the Senate understandings, were promulgated in 1999.

Since that time, only a small number of individuals have benefited from protection under the Convention Against Torture. It is an extraordinary remedy used only in the direst of circumstances. According to statistics from the Executive Office for Immigration Review, between 1999 and 2002 only 339 individuals found ineligible for asylum protection because of crimes, but in danger of torture upon return to their home countries, have benefited from the Convention Against Torture in the United States. It is not and never has been an avenue to permanent residency for human rights abusers or dangerous criminals. Unlike asylum, individuals granted Convention Against Torture relief have no right to permanent resident status. In fact, deferral of removal under the Convention Against Torture relief is the most precarious and restricted immigration relief under the Immigration and Nationality Act. But it has saved lives and it has prevented torture.

This morning I would like to address five points regarding Convention Against Torture relief for your consideration.

First and foremost, barring human right abusers or serious criminals from the protection of Article 3 would violate U.S. obligations under the Convention Against Torture. Article 3 of the Convention contains no exceptions or limitations. The drafters in their foresight recognized that torture is an evil that can never be condoned. The Senate also acknowledged this fact by adding no understandings or reservations regarding possible exceptions to the non-return provision. In passing implementing legislation in 1998, Congress also recognized that any restrictions or limitations on relief under the Convention had to be consistent with U.S. obligations under the Convention. *See* Section 2242(c) of the Foreign Affairs Reform and Restructuring Act of 1998 (which provides that only "to the maximum extent consistent with the obligations of the United States under the Convention [could the U.S.] exclude from protection [individuals barred from withholding of removal for security-related or criminal offenses]").

Second, existing laws and regulations adequately protect the American public from human rights abusers and serious criminals who could benefit from protection under Convention Against Torture. The Supreme Court has recognized that non-citizens who cannot be removed from the United States may continue to be held in detention under "special circumstances." *Zadvydas* v. *Davis*, 533 U.S. 678, 691 (2001). Regulations promulgated after the *Zadvydas* decision have defined these special circumstances to include cases of non-citizens who are "detained on account of security or terrorism related concerns" (8 CFR 241.14(d)) or "determined to be especially dangerous," i.e. individuals who have committed one or more crimes of violence and are likely to engage in violence in the future (8 CFR 241.14(f)). Additionally, the USA PATRIOT Act allows the Attorney General to certify and detain a suspected terrorist *even if* such person has been granted relief from removal. *See* INA Section 236A(a)(3)(A).

The regulations implementing the Convention also allow the U.S. to return an individual to his home country if the U.S. obtains diplomatic assurances from that country that the individual will not be tortured. *See* 8 CFR Section 208.18(c). The only case I am aware of involving diplomatic assurances occurred in 1999. As re-

ported in the *Washington Post*, the U.S. deported Hani Abdel Rahim Sayegh, an individual suspected of involvement in the Khobar Towers bombing that killed 19 U.S. servicemen in Saudi Arabia The Saudi government provided assurances that Sayegh would not be tortured upon return and as a result he was returned to face trial and possible execution if convicted. It is unclear, however, whether the U.S. has a system in place to monitor whether diplomatic assurances actually prevent torture or whether the U.S. would seek the return to the U.S. of an individual who has suffered torture despite diplomatic assurances. I would urge this Committee to consider legislation to provide such safeguards.

Third, human rights violators can and should be punished. The Convention Against Torture itself calls upon States to criminalize torture and to prosecute torturers found within their territories. If the U.S. lacks jurisdiction to prosecute, it could and should send these violators to a country or jurisdiction that will prosecute and punish them, not return them to torture. Allowing them to be tortured instead of punished only compounds their atrocities by condoning torture as a legitimate form of punishment. Victims of torture want justice. They do not want to perpetuate the use of torture.

Fourth, deferral of removal under the Convention Against Torture is an extraordinary form of relief available only to individuals who prove it is more likely than not they would face torture by the government upon return to their home country. 8 CFR 208.16(c)(2). Case law and regulations show that Convention Against Torture relief has been interpreted narrowly. It is not available to individuals who present only isolated instances of torture in their home country. *Matter of J-E-,* 23 I&N Dec. 291 (BIA 2002). It is not available to individuals fearing harm that does not amount to torture, such as inhumane prison conditions. *Id.* Similarly, pain or suffering that is incidental to lawful sanctions does not rise to the level of torture, as long as those sanctions do not defeat the purpose of the Convention to prohibit torture. 8 CFR 208.18(a)(3). In addition, torture at the hands of a non-government actor does not meet the Convention's definition of torture unless the government acquiesces or consents to the torture. *Matter of S-V-,* 22 I&N Dec. 1306 (BIA 2000). Even when a person manages to obtain a grant of deferral of removal under the Convention Against Torture, his status is a precarious one. It can be revoked in 10 days based on new or even previously existing evidence. 8 CFR 208.17(d)(1) and Office of Chief Immigration Judge, Operating Policies and Procedures Memorandum No. 99–5 (May 14, 1999). In a revocation hearing, the burden remains on the applicant to show that there continues to be a substantial risk of torture if he is returned. 8 CFR 208.17(d)(3). Moreover, a grant of deferral only precludes the removal of the individual to the country where torture is likely, not to any other country willing to accept the individual.

Lastly, the Convention Against Torture is, at times, a safety net for people whose crimes are relatively minor but who are, under current law, ineligible for asylum and withholding of removal. Over the course of my legal career, I have seen numerous instances of such cases. Here are three examples:

> A teenager who threw a rock through a window of an abandoned apartment building and merely reached in the building (but took nothing) was convicted of burglary of a habitation and sentenced to five years. He served only nine months, but was found by an immigration judge to be ineligible for asylum or withholding of deportation.
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> A young man who was admitted to the U.S. as a refugee in 1994 was convicted of kicking a police officer in South Dakota when the officer was arresting him and several other individuals who were arguing in a bar. The judge sentenced him to 10 years, but suspended the entire sentence, admonishing him to avoid places that sell alcohol and to pay restitution of $154. There was no weapon involved and no serious injury reported. He was detained by INS in April 1996 and was found ineligible to apply for asylum or withholding by the immigration judge.
>
> A man who had been severely tortured by security forces in his home country because of his political activities entered the U.S. as a refugee in 1990. He was later convicted of involvement in a robbery involving $10 and possession of drug paraphernalia. He was sentenced to just over five years and served three years and four months. He was found to be ineligible for asylum and withholding of removal.

In conclusion, I would urge you to continue the United States' commitment to the principle that no human being should be or deserves to be tortured.

Thank you for giving me this opportunity to present my views.

Mr. HOSTETTLER. We will now move to the round of questions by Members of the Subcommittee. My first question is to you, Mr. Verdery. In your testimony you state that the U.S. determination to adhere to the convention may pose a challenge to the Government's ability to protect the public. And you also state that as a result of *Zadvydas*, that while terrorists and other especially dangerous individuals may be exempt from the ruling—I am interested by that concept that they may be exempt from the ruling, because we don't really know that they are at this point. According to your testimony, many other serious criminals and other threats to public safety must be released under *Zadvydas*. It is your testimony, then, that there are times when judgment of adhering both to the convention and to the guidance under *Zadvydas* by the Supreme Court, that in fact public safety is compromised as a result of these actions, these releases of criminals into society.

Mr. VERDERY. Well, Mr. Chairman, it is clear that there are circumstances where this combination of the treaty, the court case, and the fact patterns involving any particular applicant for the relief may result in a release of somebody who we would prefer not to have on the streets. It is important to keep in mind, though, that if a person is here in this country and commits a crime, the crimes that we think of as the most dangerous, murders, et cetera, if they are prosecuted, they are going to jail. And so this problem of a particularly dangerous person.

The cases you mentioned in your opening remarks, the gentleman from the Ukraine and the gentleman from Gambia who has since departed, involved cases where criminal activity was overtaken overseas, then the person came to our country. So it is important to remember that while there are fact patterns that are troublesome and are worthy of attention, that it is not the case that people who are committing crimes in this country of a real serious nature are released.

Mr. HOSTETTLER. Generally speaking, however, except for CAT protection, a foreign national who has committed—known to commit a crime in a foreign country is subject to removal—who is here illegally is subject to removal——

Mr. VERDERY. Unless he would fall into some other exception, of course, yes. Right.

Mr. HOSTETTLER. And in general, because we believe as a country that if they have committed a serious crime in another country, it is not unlikely—more likely that they would commit a serious crime in this country as opposed to the rest of the population in our country.

Mr. VERDERY. It is clearly our policy that aliens who commit crimes under normal circumstances should be deported. And I can tell you that, again, our Department is relatively new. The Border and Transportation Security Directorate headed by a former Member of this Committee, Asa Hutchinson, one of his top priorities is to approve the removals process, especially for those who have committed crimes, but this one fact pattern does present us with a challenge.

Mr. HOSTETTLER. That leads to my second question. You state that aliens granted CAT protection make up less than 1 percent of criminal aliens who since 1999 have been released from custody

after a final order of removal. Why are all these serious criminals being released after a final order of removal? Could you explain to us why?

Mr. VERDERY. The *Zadvydas* opinion requires that people who are under an order of removal who can't be removed be released. And the normal—I mean, the overwhelming majority of these are situations where we can't return the person back to the country from which he came, because they won't accept them. Which raises the obvious problem: In countries that have the most problems, places like Vietnam and Cuba, we need a general improvement of democratic conditions of these countries. We need to work better with them on a foreign policy front to try to negotiate deportation of these large numbers of people back to their countries.

I would just say one of the many benefits of the actions recently taken in Iraq and Afghanistan may be that we will now be able to deport criminal aliens back to those countries. I know there is—I believe it is 57 of the CAT grantees are from Iraq, and 20 I believe from Afghanistan. The change in country conditions merits a review of those cases to see if now those people can be sent back to their home countries.

Mr. HOSTETTLER. Excellent point. Thank you.

Mr. Rosenbaum, you mentioned that defendants in OSI cases have refrained from filing CAT claims, with the exception of one presumably, because the Government has sought their removal to—your opinion—countries that are signatories to the convention. Do you believe that aliens should automatically be barred from seeking CAT relief from deportation to signatory countries, signatory to the convention?

Mr. ROSENBAUM. Well, that is not something that the Department has studied, so I am not sure what the Department's view would be on that. But the law is clear that if they can establish that they will more likely than not be tortured, even in a European country, they will be entitled to——

Mr. HOSTETTLER. Including a country that has signed the Convention Against Torture?

Mr. ROSENBAUM. Certainly, yes.

Mr. HOSTETTLER. With that, Ms. Germain, I would like to ask you the question, Do you think an alien should be able to claim CAT relief from a country that is a signatory to the Convention Against Torture?

Ms. GERMAIN. And this issue actually—has actually come up at the Committee Against Torture which adjudicates some of the claims under the Convention Against Torture, and it found that even if a country is a signatory, if the individual can show that torture is more likely than not within that country if he is returned there, he is eligible for relief. And the case involved the country of Turkey.

Mr. HOSTETTLER. What do you think of the integrity of a convention whose signatory—Convention Against Torture whose signatory countries commit torture?

Ms. GERMAIN. Well, this issue did come up in the Senate when the Senate was——

Mr. HOSTETTLER. Well actually, I am just wondering—your perspective.

Ms. GERMAIN. I would agree with the Senators who said it is a step in the right direction. The countries have signed it; it is a step in the right direction. The purpose is to eliminate torture. But unfortunately sometimes torture still occurs within these countries.

Mr. HOSTETTLER. We have received testimony that essentially in order to change some of these countries, that the United States of America has to invade them militarily. Do you think that that is—in many cases, is that what is changing these countries? Do they not do it voluntarily?

Ms. GERMAIN. I don't know if I can respond to that. I mean, the United States has a vast array of carrots and sticks, and I think using carrots also works.

Mr. HOSTETTLER. Do you have an example of where a carrot worked?

Ms. GERMAIN. I am a little on the spot, but let me just sort of draw from historical perspective.

From what I have read, during the Presidency of Jimmy Carter, when human rights were a priority under his Presidency, countries in Latin America specifically reported that there was less persecution occurring because of funding that might be cut off and things like that. But a specific example, I am sorry, I just at the moment can't come up with one.

Mr. HOSTETTLER. That is all right. I appreciate that.

Let's see, I had one other question. Mr. Stein, where do you see that this CAT system is going if it is not changed? And you have alluded to that to a certain extent, but where do you see it going given the recent cases and the evolution of the process?

Mr. STEIN. It seems to be establishing a separate immigration/asylum-type program, an avenue for relief, which is going to, through the pressure of the number of claims and the interpretation, grow dramatically over the coming few years. The precedents that are being established and the interpretations of both how torture is defined and how the nexus is established between the private actors and State action and the evidentiary issues and the probable high degree of fraud mean that the cases will grow and the integrity of the system will continue to erode. This seems to be the pattern with an awful lot of these.

Congress in this case, the Senate sets up what they think is a pretty precise legal standard. I also see this as being abused intentionally by organized criminal smuggling operations. So in the case of the Chen Zheng case, the claimant simply said that he was threatened by somebody who said, you know, You say anything to authorities and we are going to kill you. And that was the basis on which he claimed there was official threat of torture, claiming that he had seen some of these snakehead operators have lunch with local officials.

If that is the kind of precedent we are establishing at the appellate court level, it is going to be very difficult to contain the tight evidentiary standard for the official acquiescence component.

Mr. HOSTETTLER. The Chairman yields himself 1 additional minute for a follow-up question.

So it is your testimony that through the court system that this process is evolving into a different type of immigration law. Do you believe that this evolution was the intent of the Congress when it

passed implementing legislation, or even when the Senate passed—ratified the convention?

Mr. STEIN. I don't believe there was ever any discussion or intention that this was going to set up an absolute bar. In fact, I am quite sure that the OSI, for example, would have probably been much more vocal given that, you know, if we had ratified this convention 20 years ago, an awful lot of these Nazi war criminals might have figured out ways of raising torture claims. It is inconceivable that—because there was virtually no public debate during that period on this whole question of how we were ratifying a treaty which in its primary operation was going to have a major effect not on eliminating torture in other countries, but in forcing us to change our immigration laws, harbor some of the worst people the world has ever seen and, by extension through the universal jurisdiction component, actually undertake a costly and expensive prosecution at U.S. Taxpayers' expense to try to prosecute these folks; which, of course, is unlikely to happen in all but a handful of cases. So it is one of those things where we are dealing with these abstractions, trying to do the right thing. But what we are concerned about is what is happening, in fact, and what we see in fact is happening is something never contemplated by anybody.

Mr. HOSTETTLER. Thank you, Mr. Stein. The Chair now recognizes——

Mr. VERDERY. Mr. Chairman, could I just add one point on this point?

Mr. HOSTETTLER. Yes, Mr. Verdery.

Mr. VERDERY. I am sorry to interrupt, but as I mentioned briefly, with the Department of Homeland Security being stood up earlier this year, and the Immigration and Naturalization Service being transferred into three parts, obviously now within the Department, we have control over a large slice of this issue and I think we are ready to take a fresh look at this. The attorneys at the Immigration and Customs Enforcement Bureau handle these cases on a trial basis on an individualized basis. We would like to look at proposed solutions. We really do want to minimize the risk that this treaty poses to public safety and we want to take a fresh look at any carrot or stick within our jurisdiction that should be utilized.

Mr. HOSTETTLER. Thank you, Mr. Verdery. We very much appreciate that.

The Chair now recognizes the gentlelady from Texas, the Ranking Member, Ms. Jackson Lee.

Ms. JACKSON LEE. I am not sure whether Mr. Verdery has thrown in the towel. I am not sure what you are saying. What are you saying? You are committed to looking at this administratively and looking at all options. Is that what you are saying?

Mr. VERDERY. I am just saying that with the new chain of command with BICE reporting out through the Border and Transportation Security Directorate and then eventually the Secretary, we have new people involved with this. And we would like to—you know, any suggestions that people have to minimize any kind of risk that this treaty combined with the court case poses to public safety, we want to take a look at.

It is clear, I think, that at the end of the day there are certainly going to be fact patterns where we are going to have people re-

leased that we would rather have in custody. But we are committed to trying to minimize that situation as much as possible while maintaining our obligations to the treaty and to the law.

Ms. JACKSON LEE. Let me read you this: Despite such clear direction from Congress that CAT be applied sparingly, restrictively, and so as to induce compliance with humanitarian norms by foreign states, we have seen the administrative agencies in the Ninth Circuit move recklessly to interpret the convention in the broadest sense as an immigration program for highly undesirable aliens, with no indication that grave and fully documented abuses of human rights have been reduced or discouraged in any way.

Do you adhere to the fact that you have acted recklessly and broadly?

Mr. VERDERY. I am sorry. Whose quote is that?

Ms. JACKSON LEE. Do you adhere to the fact that——

Mr. STEIN. That is mine.

Ms. JACKSON LEE.—that you have acted recklessly and in the broadest sense? Do you adhere that the INS before you, and now the Department of Homeland Security, do you agree with that statement?

Mr. VERDERY. No, I do not. It is my understanding that the Ninth Circuit case that you referenced, we are considering an appeal of that decision. We will have an opportunity to make additional arguments concerning that factual situation, but no I wouldn't agree with that assertion.

Ms. JACKSON LEE. Thank you, Mr. Verdery. Let me refer to your testimony as well. And I appreciate your openness and willingness to listen to Congress, because we do have an oversight responsibility. But as I listened to your testimony in the beginning, let me track some of the comments that you made.

Less than 3 percent of the applications are successful. Is that accurate?

Mr. VERDERY. That is my understanding, yes.

Ms. JACKSON LEE. And you noted a figure of 558. I think there is—Ms. Germain you had 339 in 2002—and then you said less than 15 percent of those were granted; is that accurate?

Mr. VERDERY. That is my understanding.

Ms. JACKSON LEE. And then let me—help me understand. Less than 1 percent of criminal aliens, what was that comment about?

Mr. VERDERY. That of the total universe of criminal aliens who have had to be released into the public, less than 1 percent of them, it was because of the CAT protection. The other 99 percent had relief for other reasons.

Ms. JACKSON LEE. And therefore we are speaking about very minute numbers at this juncture.

Mr. VERDERY. Of the total group it is a small percentage.

Ms. JACKSON LEE. Knowing how I have worked with the INS before, and now of course the new bureau in the Department of Homeland Security, we all know that the INS—that we have been working with the INS over the years and we have all had our comments. But I would like to say that I know and believe that many of your personnel—and you noted your lawyers have been vigorous—have been very diligent on many of these issues, and I think it is appropriate to put that on the record. And so when the

numbers themselves suggest that you all have been particularly diligent to comply with Congress's instructions, the intent of the convention, but as well your responsibilities, do you make that representation on the record?

Mr. VERDERY. Well, as my testimony stated, I believe that the Department and its predecessor department has been diligent in applying the law and the convention. But again we are always anxious to do the best we can. If there are improvements that can be made, we would like to look at them.

Ms. JACKSON LEE. And I would imagine that the improvements would be based upon a defined problem.

Mr. VERDERY. Of course.

Ms. JACKSON LEE. Let me—I am trying to see if this is your testimony. Did you make the point that I think you did, that most of the CAT applications would fail?

Mr. VERDERY. I believe it is about 97 percent are unsuccessful.

Ms. JACKSON LEE. In my book that is a very large number, and I would imagine that there is a detailed scrutiny on those individuals which results in the 97 percent number of failures.

Mr. VERDERY. That is right. And it is important to remember that these are individualized opinions and decisions and not—you can't just get a relief because you come from a certain place.

Ms. JACKSON LEE. Mr. Rosenbaum, let me—since you asked the question, let me say, yes, the child has grown up very well. We thank you for your work. Seventy-one Nazis off the street or out of sight is a reason for applause and celebration. And I think you said convicted since 1979. And I think that is extremely helpful.

Help me understand now with the Department of Justice, and I think—because I think there was some metaphor that my good friend Mr. Stein was using, and I am not sure what that was. But you said only one of those individuals had sought CAT relief. Can you tell me the result of that, please?

Mr. ROSENBAUM. That was the Szehinskyj case in Philadelphia, and that CAT claim was rejected earlier this year without a hearing.

Ms. JACKSON LEE. So they sought relief and it was rejected.

Mr. ROSENBAUM. It was denied.

Ms. JACKSON LEE. And tell me the status of your work now in that area you are pursuing and how are you working and correlating even with now the new issues of terrorism?

Mr. ROSENBAUM. We are aggressively pursuing 20 cases in Federal courts; that is, in the Article III Federal courts and in immigration courts around the country. We have over a hundred individuals under investigation for complicity in World War II crimes. Where we can help in cases involving more recent horrors, we do. We were, for example, involved in assisting the U.S. Attorney's Office in Miami in its successful naturalization fraud criminal prosecution of the Cuban torturer Eriberto Mederos and we look forward to more such opportunities to be of service.

Ms. JACKSON LEE. If, for example in the course of the investigations you are now pursuing, there are CAT applications, do you feel that the Department of Justice is well staffed, or, as they say, well staffed with lawyers who can diligently review and/or oppose those applications or find them to be frivolous if so?

Mr. ROSENBAUM. Well, I have always been very proud to be a Department of Justice attorney, and some of the finest attorneys I have ever met—I hope the Subcommittee won't consider that an oxymoron—work at the Department of Justice. So I am sure that we have many, many gifted attorneys who can work on these cases.

Ms. JACKSON LEE. And they will do that at the highest level of diligence, I understand.

Mr. ROSENBAUM. The Attorney General has told us that they had better.

Ms. JACKSON LEE. Well, you know, with only one application out of the 71, and that one failed, I think you have been doing a fairly good job. So as I said, the issue is the promise—Chairman, if you will indulge me an additional 2 minutes for questions that I need to pursue.

Mr. HOSTETTLER. Without objection.

Ms. JACKSON LEE. Mr. Stein, what is the—excuse me. What immigration policies does FAIR support? Do you support immigration pursuing—being pursued in the United States, or do you have a policy of abolishing immigration totally here in the United States? And if you support any policies, what are those?

Mr. STEIN. We have a pretty long laundry list of both policies and legislative recommendations which I am happy to supply.

Ms. JACKSON LEE. What is the bottom line of your position? You have come before us, as you said, a hundred times and I have never heard an immigration policy that you would embrace. Which one do you embrace? Do you believe in the Statute of Liberty where, Come one, bring us your forlorn into the United States—which hasn't been torn down yet?

Mr. STEIN. A policy that serves the national interest, that responds to the best interests of all the American people.

Ms. JACKSON LEE. What is that? What is the policy that serves the national interest?

Mr. STEIN. We would be happy with an annual immigration rate of 200,000 a year, which is consistent with the last 400 years of American history.

Ms. JACKSON LEE. So that you would support.

Mr. STEIN. Sure.

Ms. JACKSON LEE. That is good news to get that on the record. I might ask you back to be a witness for me. You actually have supported some kind of program dealing with immigration. Let me ask you whether or not you have statistics on criminal conduct among people with CAT protection who have been released from custody. Can you give me those statistics?

Mr. STEIN. You are asking me?

Ms. JACKSON LEE. Yes. What are they?

Mr. STEIN. One of the problems with the whole data procedure——

Ms. JACKSON LEE. Do you have statistics, any statistics on criminal conduct among people with CAT protection who have been released from custody? What is the percentage that we are talking about?

Mr. STEIN. I can't—they won't give us information on who has been released.

Ms. JACKSON LEE. Well, I heard statistics right here. I heard statistics from Mr. Verdery, Ms. Germain.

Mr. STEIN. I can't even get information on the basis of the claim. The only way we know about the Hamadi case——

Ms. JACKSON LEE. What are the criminal statistics that you believe would suggest that we need to overhaul the convention that protects those who have been tortured?

Mr. STEIN. Well, I would suggest that when the BIA finds that a guy is, quote, a danger to the security of the United States——

Ms. JACKSON LEE. A guy is quoted. Is that a guy——

Mr. STEIN. BIA, the Board of Immigration Appeals. The Board of Immigration Appeals held that Hamadi was a danger, quote, to the security of the United States.

Ms. JACKSON LEE. Is that Hamadi plural or Hamadi one?

Mr. STEIN. Hamadi. The case is In Re Hamadi. The Board of Immigration Appeals, October——

Ms. JACKSON LEE. Regarding one individual?

Mr. STEIN. It only took 18 guys to blow up the World Trade Center and a few——

Ms. JACKSON LEE. Regarding one individual.

Mr. STEIN. I think we need to use the lamp of experience.

Ms. JACKSON LEE. Regarding one individual.

Mr. STEIN. And try to make recommendations that help us understand what is going to happen.

Ms. JACKSON LEE. Absolutely, to solve—you are absolutely right.

Mr. STEIN. I certainly wouldn't want to release this guy, would you?

Ms. JACKSON LEE. One individual. And I do believe that one individual, you are probably right, can create havoc. But the issue is that we are talking about principles of torture. We are talking about numbers of 558 and 339 and we are talking about absolute outrageous incidences of torture that some would be subjected to, which I believe are clearly values of this country as the President evidenced in June.

Ms. Germain, might you give an answer to me on the Hamady case? Are you familiar with that?

Ms. GERMAIN. On how many cases of people who have been——

Ms. JACKSON LEE. No. He is referring to the Hamady case.

Ms. GERMAIN. Oh, yes. My response to that would be that clearly the Government of the United States has the ability to detain this person. And also, if they were able to receive diplomatic assurances that the person would not be tortured in their home country, return them or criminally prosecute the person possibly. So there are lots of different avenues to pursue in this case.

Ms. JACKSON LEE. And we don't have to—this individual does not have to walk the streets. We can vigorously pursue this kind of prosecution.

If I might conclude, you did not—you cited in your testimony a teenager or young man, et cetera. Just give us an example of the point that you are making about the fact that you can be considered a criminal here in the United States for minor offenses, but then be subjected to go back to your country without this particular relief to a place where you would be dismembered or something else would occur to you. Will you highlight that for us, please?

Ms. GERMAIN. Right. Yes. My point, my last point was that individuals who should be eligible for asylum in the U.S. Because their crimes are not so serious that they should be returned to persecution are found to be ineligible for asylum or withholding of removal. And as you see in this case, this young man who happened to have been from—living in Houston Texas, threw a rock——

Ms. JACKSON LEE. He was from Libya?

Ms. GERMAIN. No, he was living in Houston, Texas. And he threw the rock through the window of an abandoned building, so clearly wasn't endangering anyone, and reached inside. But under State law, that is a burglary of a habitation, even though it was unoccupied, and he was sentenced to 5 years which would then bar him from asylum or withholding of removal. CAT now is the only form of relief available to people who, because of very strict criminal bars to asylum, would not benefit from asylum or withholding of removal and some of the other cases here.

Ms. JACKSON LEE. And he might have been sent back to a country that would torture him. Is that what you are saying?

Ms. GERMAIN. Right. Or persecute him. Persecute him also.

Ms. JACKSON LEE. I thank you very much. I thank the Chairman for his indulgence.

Mr. HOSTETTLER. Thank the gentlelady. The Chair now recognizes the gentleman from Iowa, Mr. King, 5 minutes.

Mr. KING. Thank you, Mr. Chairman. I will direct my first question to Mr. Verdery. And can you tell this panel, is there—what is the definition of torture that we are using here?

Mr. VERDERY. Well, I have to flip through my book here, but it is a—I mean, it is a lengthy definition which requires more than just an isolated incidence of abuse, requires a continued pattern. And again the key word is more likely than not. So it is not something—you know it is not a criminal standard. It is very high.

Mr. KING. This thought jumps into my mind as I hear the penalty for knocking a window out of an abandoned building and I think of the caning incident in Singapore. Would that be included in the definition of torture?

Mr. VERDERY. I am not sure. My understanding is that punishments merited out as part of a legal proceeding by the Government that wouldn't violate our view of the eighth amendment would not be considered torture. But I want to get back to you with a specific answer after the hearing, if I could.

Mr. KING. I would be very interested in that. And as you discussed, the countries who will not receive our deportations—you mentioned Cuba and Vietnam. Could you provide us a broader list? How many countries is that, and what are some of those?

Mr. VERDERY. Oh, I am not sure. But let me see here of the total list, let's see, we have Afghanistan, Cambodia, Cuba, Iran, Iraq, Laos, Vietnam are some of the countries where we are talking large numbers. There is a longer list of, you know, smaller numbers that we can't deport.

Mr. KING. And some of—those are those that they say will not accept under any circumstances—our deportations to them under any circumstances.

Mr. VERDERY. I am not sure if it is under no circumstances, but it has been the majority of circumstances, we have been unable to deport.

Mr. KING. And that is a list distinct from a list of countries whom we can't be assured that they will not commit torture on the persons deported to the second list of countries.

Mr. VERDERY. They are not related directly. I mean, of course you might find some of the same countries; but again, remember the determination for an individual claimant depends on the individual facts of the case. There is no provision in the regulations of the statutes that says if you are from country X you are successfully granted the protection.

Mr. KING. So this list, this might be broader than I might envision. But also the court will determine in each individual case whether they can return that individual to their home country, if they will be accepted. So this list could grow, case-by-case list of countries.

Mr. VERDERY. No, it is not the court deciding whether or not that the home country would accept them. That is a provision that is negotiated with the State Department. The court decides whether or not they have an individualized justifiable fear of torture more likely than not.

Mr. KING. Correct. I understand that. So we are dealing, though, with a list of countries that, as that determination is made case by case, could get longer and longer.

Mr. VERDERY. I suppose so, yes.

Mr. KING. And is likely to do so.

Mr. VERDERY. I am sorry?

Mr. KING. And probably is likely to get longer.

Mr. VERDERY. Well I mean, again, it depends on what is happening in those host countries. I mean, you could have countries where there is improvement in the democratic conditions—Iraq, Afghanistan, or places we are hopeful. There are other countries where originally determinations were made of conditions, and then improvements were made. We have been able to send observers into certain countries to improve conditions and then minimize the likelihood that a fact finder would find that they have a more likely than not likelihood of being tortured.

Mr. KING. Thank you. Do you agree with the statement that was made that we have other alternatives to detain and incarcerate those released under *Zadvydas*.

Mr. VERDERY. Well, there are other ways. The BICE is working aggressively in certain cases where we feel we may end up having to release somebody under *Zadvydas* to try to negotiate a bond settlement so that before they are released we can have some conditions on their release, such as checking in with a monitor within BICE, these other kinds of conditions, so we at least have some idea where they are. So we are trying to be more creative in negotiating the plea agreements, in a sense, in essence before they are released.

Mr. ROSENBAUM. Could I——

Mr. KING. Please, Mr. Rosenbaum.

Mr. ROSENBAUM. With the Subcommittee's permission and the Congressman's permission, if I could perhaps just briefly supple-

ment Mr. Verdery's testimony on the list of countries that won't accept these people. I would not want the Subcommittee to be left with the impression that it is only undemocratic countries, lawless countries even, that refuse to accept these individuals, or countries with which we perhaps don't have diplomatic relations. In our cases—in the Nazi cases—some of the most prominent democracies in the world have refused to accept the return of these individuals as well.

Mr. KING. Thank you.

Mr. VERDERY. Congressman, just one other point which I think is responsive to one of your questions is that somebody mentioned early that there is a procedure by which the Secretary of State can give assurances to what is the Attorney General—now it is the Department of Homeland Security Secretary—that in that particular case that the Secretary of State does not feel there is a likelihood of being tortured if we were able to return somebody that has demonstrated that to a court. My understanding is that has happened in two cases since the CAT convention. We are anxious to try to work with the State Department to see if there are additional instances where that authority could be utilized for—again for people to be returned.

Mr. KING. Thank you. And, Mr. Chairman, I see my time has expired, and I would ask unanimous consent for 1 additional minute.

Mr. HOSTETTLER. Without objection.

Mr. KING. Thank you. And I direct my question to Mr. Stein. Mr. Stein, would you then present to this Committee your recommendation on policy changes you would like to see made?

Mr. STEIN. Thank you for that opportunity. I will just run through it real quick. The option of continuing to detain removable aliens until such time as removal can be effectuated has been eroded since the Supreme Court ruling in *Zadvydas*. The erosion of the Attorney General's authority to detain removable aliens has changed the entire framework for analyzing the impact of CAT on immigration rules. Until such time it was assumed the INS or the ICE could detain someone indefinitely and the Supreme Court, trenching upon that authority, is really a precedent that we are concerned about. Because the CAT responsibilities assumed by the U.S. were not self-executing, as the Senate stipulated in its advice and consent, Congress has the authority for specifying criteria for CAT's implementation.

It would be our preferred option for Congress to specify that CAT protections are not absolute and do not apply to serious criminals and human rights abusers. More generally, we would like to see claims brought under CAT merged within the asylum process and considered within the same claim. Any adverse credibility determinations made during the asylum process should also operate to bar a CAT claim.

In conjunction with this approach, the Department of State should be encouraged to obtain commitments from home countries that a returned alien will not be subject to torture or find safe third countries where they can also be returned. And then where torture claims are based on claims of official acquiescence in torture, the standard of proof must be raised and the nexus between state action and private actors must be better defined.

Finally, the U.S. should bar general immigration from any country that refuses to guarantee the safety and security of foreign nationals returned from the United States. To prevent the alien from being released back into American society the U.S. can assume responsibility for obtaining evidence from the home country about the crimes committed by these individuals and effecting prosecution in the U.S. for these crimes. That is possible now under title 18, section 2348 of the U.S. Code, but that involves an onerous assumption of new investigatory and prosecutorial authority responsibility for the U.S. Government. And the downside is the taxpayer is then absorbing enormous costs associated with prosecuting people for crimes that were not committed in this country and never affected and don't affect citizens or nationals of the United States.

We have some more, but I will leave it at that for now Congressman.

Mr. KING. Mr. Stein, thank you. I appreciate that and I will give serious consideration to those recommendations.

Thank you, Mr. Chairman. I yield back.

Mr. HOSTETTLER. Thank the gentleman. The Chair now recognizes the gentlelady from Tennessee, Mrs. Blackburn.

Mrs. BLACKBURN. Thank you, Mr. Chairman, and thank you to all of you for being here and talking with us today.

Mr. Stein, the question that Congressman King asked you was the one that I was going tp begin with. He was asking what your recommendations would be and what had led you to those recommendations. So what we will do is set that aside and maybe come back to it at the end of my questioning.

Mr. Verdery, good to see you again. Thank you for being here.

Mr. VERDERY. Thank you.

Mrs. BLACKBURN. You know, reading through the testimony and everything, there are a lot of percentages and numbers. And I know bureaucrats love to talk in terms of percentages, but where I come from, we like to talk about hard numbers. So let's go back and talk about the convention on torture. And I see, Mr. Rosenbaum, in your testimony you have talked about that the judges had adjudicated 17,302 CAT claims this year—last year.

Mr. ROSENBAUM. In fiscal 2002.

Mrs. BLACKBURN. All right. And 558 of those were granted. So Mr. Verdery, I am going to come to you. Let's talk total numbers. How many total under the convention against torture, how many total claims have been granted?

Mr. VERDERY. How many total, or how many of those had criminal histories?

Mrs. BLACKBURN. How many total?

Mr. VERDERY. About 1,700 since the regulations were put into effect.

Mrs. BLACKBURN. So we have got 1,700, and how many of those are criminal aliens?

Mr. VERDERY. Approximately 611. Again there—as has been mentioned several times, the data here is a little sketchy.

Mrs. BLACKBURN. Yeah. You know, I think that is one of the things that probably is disconcerting to a lot of my constituents is we talk about having data, but we are not sure if it is good evalu-

ated data and we are not sure if it is hard numbers and that leads to distrust. So that is of concern.

Okay. Now, with the 611 criminal aliens that are out there, do you—does the Department of Homeland Security have a process in place for notifying those families when a criminal alien is released onto American streets? Yes or no?

Mr. VERDERY. Well, that was the exact question I asked when I heard I was testifying. And my understanding is that the answer at this time is no.

Mrs. BLACKBURN. The answer is no. So a victim——

Mr. VERDERY. If I can just continue. Under the majority of circumstances, as I mentioned, there are some that have bond conditions, et cetera, et cetera.

Mrs. BLACKBURN. Okay. So a victim or a victim's family would not know if a criminal alien was being released onto American streets. Yes or no?

Mr. VERDERY. No. Again, remembering that the victims formally, if they have committed a U.S. crime, they should be in a U.S. prison.

Mrs. BLACKBURN. Okay. Next question. How do you go about tracking or monitoring criminal aliens that have been released onto American streets?

Mr. VERDERY. As far as I know, again, unless they have had a particularized setting of conditions under their release, there is no tracking of them in terms of once they have been given this deferral of removal there is no tracking of them.

Mrs. BLACKBURN. There is no tracking of them. Okay.

Ms. Germain, do you think it is acceptable that in many of these cases these aliens involved in criminal activities are being released onto our streets?

Ms. GERMAIN. Well, my response to that is, it depends. Certainly the regulations allow for someone who is especially dangerous and likely to commit a crime again to be held in detention, and I think that would adequately protect the American public—a person who is likely to commit a crime in the future being detained.

Mrs. BLACKBURN. Being detained for a given period of time, or——

Ms. GERMAIN. Well, I think the regulations provide until such time as their likelihood of torture upon return is not there.

Mrs. BLACKBURN. Okay. Thank you all. I see my time is about to expire.

Mr. Stein, I will come back to you in closing. And following on, you very quickly ran through your recommendations for correcting the problem. And I think as we sit here and we—as we all are concerned, terribly concerned about protecting our citizens on our streets, and terribly concerned about public safety and homeland security, it is somewhat refreshing to have someone come in and say, yes, we do realize that there is a problem and we would like to bring some thoughts for consideration for correcting to the table.

I join Mr. King in saying I would be interested in seeing what your recommendations would be, and I would like to submit those to the record for consideration. And I thank all of you very much for taking the time to come and visit with us today. Thank you.

Mr. HOSTETTLER. Thank the gentlelady.

At this time, I want to thank the witnesses for your testimony today and without objection I wish to insert into the record the statement of Richard Krieger, president of International Education Missions, Incorporated. He has worked tirelessly at finding human rights violators in the U.S. And has brought them to this Government's attention.

Ms. JACKSON LEE. Mr. Chairman.

Mr. HOSTETTLER. Yes.

Ms. JACKSON LEE. I would like to likewise—I am sorry. Did you finish your——

Mr. HOSTETTLER. No. Just one more thing. And has brought them to the U.S. Government's attention. And we appreciate that and we will enter his statement into the record.

The Chair recognizes——

Mr. STEIN. Mr. Chairman, might I also introduce this case of Yousef Hamadi into the record that I referred to? I don't believe it is a public document.

Mr. HOSTETTLER. With the potential possibility that it may be redacted and the Subcommittee will show its discretion in that.

The gentlelady from Texas.

Ms. JACKSON LEE. Is that submission part of his testimony? Is that what the counsel is ruling? I am asking, he is asking to submit something into the record. Is that part of his testimony?

Mr. HOSTETTLER. Yes.

Ms. JACKSON LEE. Is that what you are ruling on?

Mr. HOSTETTLER. Yes.

Ms. JACKSON LEE. So that would be part of his testimony?

Mr. HOSTETTLER. Yes.

Ms. JACKSON LEE. Thank you. I'd ask unanimous consent to submit into the record the testimony of—well, the statement by Amnesty International, submitted by Susan Benesch, refugee advocate, Amnesty International, dated Friday, July 11, 2003.

Mr. HOSTETTLER. Without objection.

Ms. JACKSON LEE. And I'd ask to submit from Morton Sklar, Executive Director, World Organization Against Torture USA, statements on the hearing today regarding the convention against torture to U.S. Interests.

Mr. HOSTETTLER. Without objection.

Mr. VERDERY. Mr. Chairman, before the record is closed, if I could just elaborate on one of my prior answers.

Mr. HOSTETTLER. Without objection.

Mr. VERDERY. I believe Congresswoman Blackburn asked about the tracking of individuals. I should have mentioned that anybody who is released into the public under a deferral of removal does have to provide the Department with an address, any change of addresses, in addition to trial attorneys constantly reviewing files to see if changes of condition merit reopening cases and the like. So I didn't want to leave the wrong impression of our efforts to keep track of these individuals.

Mr. HOSTETTLER. Thank you.

Ms. JACKSON LEE. And Mr. Chairman, would you indulge me just for a moment as he is clarifying the record and I know you are closing the hearing. Would you indulge us? And I think you said something to Mrs. Blackburn that should be cleared as well. What you

indicated was that the criminal aliens in most instances would be in United States' jails.

Mr. VERDERY. If they have committed a crime in the United States and have been prosecuted in the United States, presumably they are serving their time in the United States.

Ms. JACKSON LEE. And if the crime was international, meaning over in their other country, we would have little opportunity to notify the victims of their release, because the victims would be located in another country.

Mr. VERDERY. Exactly.

Ms. JACKSON LEE. All right. I thank the Chairman for his indulgence.

Mr. HOSTETTLER. I thank the gentlelady.

The Chair reminds the Committee that we have 7 legislative days to add to the record. Once again, thanking the panel of witnesses. The business before the Subcommittee being completed, we are adjourned.

[Whereupon, at 10:45 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

The United Nations Convention Against Torture (CAT) is a fundamental pillar of our human rights and national interest policy. It prohibits our removal and extradition processes from returning aliens to countries where they probably would be tortured. It may increase the likelihood that torturers and other major human rights abusers will be held accountable for their actions through criminal prosecutions and civil liability lawsuits in U.S. courts. It supports our efforts to promote human rights compliance and prevent torture in foreign nations. And, it encourages the growth of human rights oriented standards and institutions throughout the world.

The Convention Against Torture is one of the four primary international human rights documents. It stands, along with the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Genocide Convention, as the cornerstone of our country's, and the international community's, effort to stop the most heinous forms of governmental oppression and abuse.

Article 3 of the Convention forbids a State Party from forcibly returning a person to a country "where there are substantial grounds for believing that he would be in danger of being subjected to torture." This is country specific. The prohibition does not bar forcibly returning the person to other countries in which he or she would not be in danger of being subjected to torture.

I support this absolute standard because torture is so horrendous and so contrary to our ethical, spiritual, and democratic beliefs, that it must be absolutely condemned and prohibited. Even the most abhorrent individuals, including criminals and torturers themselves, are entitled to invoke the protections of CAT in order to prevent being returned to torture in their home countries.

In *Zadvydas* v. *Davis*, 533 U. S. 678 (2001), the United States Supreme Court held that the detention provisions in the Immigration and Nationality Act (INA), read in light of the Constitution's demands, limit an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. The Supreme Court found further that once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute—except where special circumstances justify continued detention. The special circumstances may indicate that continued detention is necessary to protect the public.

In response to that Supreme Court decision, the former Immigration and Naturalization Service (INS) promulgated regulations for determining the circumstances under which an alien may be held in custody beyond the statutory removal period. 8 C.F.R. § 241.4. These regulations authorize the Government to continue to detain aliens who present foreign policy concerns or national security and terrorism concerns, as well as individuals who are specially dangerous due to a mental condition or personality disorder, even though their removal is not likely in the reasonably foreseeable future.

While we may be prohibited from sending them back to their home countries, we are under an obligation to criminally prosecute them for acts of torture or other international or domestic crimes. Also, although the grant of CAT protection is absolute, it is not permanent relief. It can be removed when the conditions in the home country change so as to eliminate the risk of torture.

We have made a commitment not to practice or tolerate torture under any circumstance, or for any reason. I believe that we can—and we must—honor that commitment without endangering our society.

[redacted]

Date: [redacted] 2001

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: [redacted] Esquire

ON BEHALF OF SERVICE: [redacted]
Assistant District Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Asylum, Withholding of Removal, Convention Against Torture[illegible]

On [redacted] 2001, an Immigration Judge found the respondent to be removable as an alien present in the United States without being admitted or paroled. *See* Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i). The Immigration Judge denied the respondent's application for asylum under section 208 of the Act, 8 U.S.C. § 1158, but granted his application for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3). The Immigration and Naturalization Service (the "Service") has appealed.[2] The appeal will be sustained in part; the Immigration Judge's decision will be vacated and the respondent will be granted deferral of removal under the Convention Against Torture.[3]

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[1] The Immigration Judge noted for the record that the respondent's name was misspelled on his Notice to Appear ("NTA"), although she did not amend the NTA itself.

[2] The Service submitted additional documentation for our consideration after its brief was filed. We will not consider the documents on appeal, as the respondent has not been provided with an opportunity to rebut them.

[3] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. res. 39/46 (annex, 39 U.N. GAOR Supp. (No. 51) at 197), U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988).

[redacted]

The respondent is a native and citizen of Iran. He entered the United States at or near Blaine, Washington on August 14, 1997. He bases his written asylum applications on his fear of persecution by the Iranian government on account of his political opinion (Exhs. 1, 3).

I. TERRORISM BAR TO ASYLUM AND WITHHOLDING OF REMOVAL

The initial issue to be resolved before us in this matter is whether the respondent is statutorily barred from asylum under section 208 of the Act and withholding of removal under section 241(b)(3) of the Act and the Convention Against Torture by section 212(a)(3)(B) of the Act, 8 U.S.C. § 1182(a)(3)(B), as a result of his affiliation with an organization known as the "Mujahedin-e Khalq" ("MEK," "NCR").

Section 208(b)(2)(A)(v) of the Act bars the Attorney General from granting asylum to certain inadmissible aliens:

> (v) the alien is inadmissible under subclause (I), (II), (III), or (IV) of section 212(a)(3)(B)(i) or removable under section 237(a)(4)(B) (relating to terrorist activity), unless, in the case only of an alien inadmissible under subclause (IV) of section 212(a)(3)(B)(i), the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or...

Similarly, section 241(b)(3)(B)(iv) of the Act bars the Attorney General from granting withholding of removal when "there are reasonable grounds to believe that the alien is a danger to the security of the United States."

Although the Service did not charge the respondent with being inadmissible under section 212(a)(3)(B) of the Act, it argues, and we agree that the respondent is inadmissible on this ground, as an alien who the Attorney General "knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity as defined in subclause (III)." *See generally Matter of Soleimani*, 17 I&N Dec. 167 (BIA 1979) (noting that in considering grounds of inadmissibility, an Immigration Court is not limited to those raised by the Service).

Section 212(a)(3)(B)(ii) of the Act defines terrorist activity as:

> any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:
>
> > (I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
> > (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

[redacted]

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.
(IV) An assassination.
(V) The use of any –
(a) biological agent, chemical agent, or nuclear weapon or device, or
(b) explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
(VI) A threat, attempt, or conspiracy to do any of the foregoing.

The Act also defines the term "engage in terrorist activity" as follows:

As used in this Act, the term "engage in terrorist activity" means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including any of the following acts:

(I) The preparation or planning of a terrorist activity.
(II) The gathering of information on potential targets for terrorist activity.
(III) The providing of any type of material support, including a safe house, transportation, communications, funds, false documentation or identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity.
(IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization.
(V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.

Section 212(a)(3)(B)(iii) of the Act.

The threshold issue regarding inadmissibility under section 212(a)(3)(B)(i)(II) of the Act is what constitutes a "reasonable ground to believe" that the respondent is engaged in or is likely to engage after entry in any terrorist activity. Although there is no controlling case law defining a "reasonable ground to believe" as that phrase is used in section 212(a)(3)(B) of the Act, similar language in different statutes has generally been interpreted as a "probable cause" requirement. *See generally Ludecke v. U.S. Marshal*, 15 F.3d 496, 497 (5th Cir. 1994) (equating probable cause with a "reasonable ground" to believe the accused guilty); *Adams v. Baker*, 909 F.2d 643, 649 (1st Cir. 1990) (noting that a "reasonable belief" that the alien is involved in terrorist activity may be formed if the evidence linking the alien to terrorist violence is sufficient to justify a "reasonable person" in the belief that the alien falls within the prescribed category); *Oen Fin-Chay v. Robinson*, 858 F.2d 1400, 1407 (9th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989) (equating probable cause to a "reasonable ground to believe the accused guilty" in an extradition case); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972) (noting that in order

[redacted]

to issue an order and warrant for commitment in international extradition cases, the "existence of probable cause or, in other words, the existence of a reasonable ground to believe the accused guilty of the crime charged" is essential). In addition, Black's Law Dictionary (6th ed. 1991), defines "probable cause" as "[r]easonable cause; having more evidence for than against. A reasonable ground for belief in certain alleged facts." We find "probable cause" to be a reasonable interpretation of section 212(a)(3)(B) of the Act and apply this standard in our adjudication of this appeal.

We find that the Immigration Judge erred in concluding that the respondent was not barred from asylum and withholding of removal under sections 208 and 241(b)(3) of the Act and under the Convention against Torture as a result of his MEK participation.[4]

According to the United States State Department's *Patterns of Global Terrorism, 1994* (Exh. 30), the MEK concluded in the 1970's that violence was the only way to bring about change in Iran. *Id.* at 13. The MEK directs a worldwide campaign against the Iranian government and that stresses propaganda and occasionally uses terrorist violence. *Id.* at 14. During the 1970's, the MEK staged terrorist attacks inside Iran to destabilize and embarrass the Shah's regime; the group killed several U.S. military personnel and civilians working on defense projects in Tehran. *Id.* at 14. In April 1992, the MEK carried out nearly simultaneous attacks on Iranian embassies in 13 different countries in North America, Europe and the Pacific Rim. The attacks caused extensive property damage and demonstrated the group's ability to mount large-scale operations overseas. *Id.* at 14. Since the mid-1980's, the MEK has not mounted terrorist operations in Iran at a level similar to its activities in the 1970's. *Id.* at 14. The MEK has had more success in confronting Iranian representatives overseas through propaganda and street demonstrations. Beyond support from Iraq, the MEK uses front organizations to solicit contributions from expatriate Iranian communities. *Id.* at 14. We note that similar information is included in the United States State Department's *Patterns of Global Terrorism, 1996* (Exh. 31). The MEK has been designated as a terrorist organization by the State Department since 1997, pursuant to section 219 of the Act, 8 U.S.C. § 1189, and has recently been redesignated as such an organization. *See Redesignation of Foreign Terrorist Organization*, 66 Fed. Reg. 51088 (Oct. 5, 2001). We will defer to the State Department's clear conclusion that the MEK is a terrorist organization.

The respondent states in his second asylum application (Exh. 3) that the Iranian government knows that he is an MEK supporter and will do "unspeakable things" to him. He asserts that the government has spies everywhere and will know that he was a fundraiser for the MEK. He admits that he has been an MEK supporter and attended MEK demonstrations. In his declaration, the respondent explains that he has not kept his political opinion or activities secret (Exh. 3). The respondent states that he has friends within the MEK and shares their opinions in opposition to the oppressive Iranian government.

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[4] The Service also argues that the respondent is barred from asylum because he was firmly resettled in Germany and Canada (Service Appeal Brief at 10-13). We agree with the Immigration Judge (I.J. at 23-24) that the respondent was not firmly resettled in either country, as he did not receive an offer of permanent resident status, citizenship, or some other type of permanent resettlement. 8 C.F.R. § 208.15.

[redacted]. He explained that he collected funds on behalf of Iranian orphans, an activity sponsored by the MEK (Tr. at 258, 260). The respondent claims that he was and is not an MEK member and only raised money for orphans and attended demonstrations (Tr. at 264). After his arrival in the United States, the respondent participated in MEK-sponsored demonstrations [redacted] (Tr. at 273).

A properly qualified expert witness, [redacted], whose testimony was presented by the respondent, testified that the respondent told him that he is a member of the MEK and sold MEK newspapers prior to his departure from Iran (Tr. at 409-410).

Special Agent [redacted] of the Service's Joint Terrorism Task Force, testified that he first came into contact with the respondent during his participation in Operation Eastern Approach, an investigation into immigration fraud in support of a terrorist organization (Tr. at 416). The respondent was being represented by a Mr. [redacted] an "immigration consultant" and the object of the investigation (Tr. at 417). Agent [redacted] concluded at the end of his investigation that the respondent was a member of a terrorist organization (Tr. at 442).

Senior Special Agent [redacted] of the Service testified that the respondent told him that he had participated in MEK demonstrations against the Iranian regime and is an MEK supporter and member (Tr. at 472). The respondent admitted to Agent [redacted] that he had raised funds to support MEK activities did not specify that the funds were raised to benefit orphans (Tr. at 498). The respondent told Agent [redacted] that he had been active with the MEK [redacted] (Tr. at 473). According United States and felt that it was his duty to kill [redacted] to Agent [redacted] the respondent explained that "each member knew what he had to do" (Tr. at 473-74). The respondent also reported to Agent [redacted] that he had gone to New York and participated in a demonstration against the Iranian government in which he tried to get close enough to visiting Iranian regime members to be able to throw eggs at them (Tr. at 475). Agent [redacted] opined that it is not possible to be an MEK member and not know of its terrorist activities, although it is possible to be a member and not participate in those activities (Tr. at 477). Agent [redacted] believes that the respondent poses a threat to the national security of the United States, in that the potential presence of members of the Iranian government could incite the respondent to perform terrorist acts that affect the general public rather than their intended targets (Tr. at 494).

We find, based on the foregoing facts, that the it is reasonable to believe that the respondent is engaged in or is likely to engage after entry in any terrorist activity. The respondent admitted that he provided material support to the MEK by soliciting funds, a group that he knew or reasonably should have known or at least had reason to believe had committed terrorist activity. Although the respondent claims that he believed that the funds he raised were being used for humanitarian relief, there is substantial evidence in the record that the MEK's primary goal is to topple the Iranian government, specifically through violent means. The respondent's belief that the money he raised was used to benefit orphans does not relieve him of the responsibility of raising funds for this organization. Because he raised funds for an organization engaged in terrorist activities, and

[redacted]

designated as a terrorist organization by the State Department, we conclude that he is removable under section 212(a)(3)(B)(i)(II) of the Act under the reasonable belief or probable cause standard.

Because the respondent is removable under section 212(a)(3)(B)(i)(II) of the Act for engaging in terrorist activity, he cannot be granted asylum "unless the Attorney General determines, in the discretion of the Attorney General, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States." Section 208(b)(2)(A)(v) of the Act.

There is little guidance to assist us in determining whether the respondent poses a "danger to the security of the United States." The United Nations Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, indicates that the bars to relief upon which our law was modeled "should be applied with caution" and "in a restrictive manner." UNHCR Handbook paragraphs 178-180 (1992). Moreover, a narrow definition of acts constituting a "danger to the security of the United States" is consistent with paragraph 149 of the Handbook which explains that "[c]onsidering the serious consequences of exclusion for the person concerned . . . the interpretation of these exclusion clauses must be restrictive." UNHCR Handbook, paragraph 149 (1992).

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214, 1277 (April 24, 1996) employs the term "national security" with the understanding that it shall have the same meaning as used in section 1(b) of the Classified Information Procedures Act ("CIPA"), Pub. L. 96-456, 94 Stat. 2025 (Oct. 15, 1980); section 501(c) of the INA. Section 1(b) of the CIPA states that the term "national security" means "the national defense and foreign relations of the United States." The definition of "national security" found in section 219(c)(2) of the Immigration and Nationality Act regarding the Secretary of State's designation of foreign terrorist organizations is even broader. That provision provides that "national security means the national defense, foreign relations, or economic interests of the United States."

Although we decline to adopt any of these definitions wholesale, they are helpful in identifying what types of factors to consider when determining if an alien is a danger to the security of the United States. For example, an alien who threatened the national defense of the United States would obviously pose a danger to the security of this country. Likewise, an alien who threatened the foreign relations of the United States could pose a danger to the security of this country. Using the definitions of "national security" set forth above as a guide for determining what factors to consider, and based on a common sense reading of the statute, we conclude that in order to find that there are reasonable grounds for regarding an alien to be a danger to the security of the United States, the alien must act in a way which 1) endangers the lives, property, or welfare of United States citizens; 2) compromises the national defense of the United States; or 3) materially damages the foreign relations or economic interests of the United States.

We find that it is reasonable to believe that the respondent poses a danger to the security of the United States. He has espoused the causes of and provided support for the MEK, an organization that has been consistently designated by the State Department as a foreign terrorist organization since the Department became required to make such a designation. The MEK, although principally concerned with overthrowing the Iranian government, bombed 13 Iranian embassies located in

[redacted]

foreign countries in 1992, which demonstrates a clear disregard for the lives of innocent civilians. It is unlikely that the MEK could finance its operations without the efforts of individuals like the respondent. Furthermore, the respondent participated in at least one demonstration in which he attempted to get close enough to an Iranian official to pelt him with eggs. This act, coupled with the fact that the respondent expressed his belief to Agent [redacted] that [redacted] demonstrates that the respondent is not opposed to using violent means, even within the United States, to further the MEK's goals. For all of these reasons, we conclude that there are reasonable grounds for regarding the respondent to be a danger to the security of the United States.

Accordingly, the only form of relief for which the respondent remains eligible is deferral of removal under the Convention Against Torture.

II. DEFERRAL OF REMOVAL

An applicant for protection under the Convention Against Torture must establish that it is more likely than not that he or she would be tortured if returned to the proposed country of removal. 8 C.F.R. § 208.16(c)(2); *Matter of S-V-*, Interim Decision 3430 (BIA May 9, 2000); *see also Ali v. Reno*, 237 F.3d 591 (6th Cir. 2001).

Unlike an applicant for asylum or withholding of removal under section 241(b)(3) of the Act, an applicant for protection under the CAT is not required to demonstrate that he or she would be tortured on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* Report of the Committee on Foreign Relations, S. Exec. Rep. No. 101-30, at 16 (1990) ("Senate Report"); *Matter of S-V-*, *supra*.

In determining whether an alien is entitled to protection under the Convention Against Torture, all evidence relevant to the possibility of future torture in the proposed country of removal shall be considered, including, but not limited to: past torture inflicted upon the applicant, evidence that the applicant could relocate to another part of the country of removal where he or she is not likely to be tortured, gross, flagrant or mass violations of human rights, and other relevant information regarding conditions in the country of removal. 8 C.F.R. § 208.16(c)(3).

Under the Convention against Torture, the harm feared must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 208.18(a)(1).

A public official's acquiescence to torture "requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 208.18(a)(7); *Ali v. Reno*, *supra*. Consequently, the definition of "torture" includes only acts that occur in the context of governmental authority. *Id; see also* 64 Fed. Reg. 8478, 8482 (1999).

Under the applicable interim regulations implementing the CAT, an alien is ineligible for withholding of removal under the CAT if, *inter alia*, there are reasonable grounds to believe that the

[redacted]

alien is a danger to the security of the United States. 8 C.F.R. § 208.16(d)(2). This bar to protection is essentially the same as the bar imposed on applicants for asylum and withholding of removal under sections 208(b)(2)(A) and 241(b)(3)(B) of the Act.

We find that it is more likely than not that the respondent will be tortured if returned to Iran. The respondent testified that he was previously tortured while being detained by the Iranian government. [redacted] (Exh. 18). [redacted] testified that the Iranian interests section in the United States is said to keep a file on MEK members and routinely perform newspaper searches (Tr. at 363). [redacted] concluded that the Iranian government is therefore likely to know [redacted] (Tr. at 363). He noted that [redacted] received wide press coverage inside and outside Iran (Tr. at 402). [redacted] stated that if the Iranian government suspected that the respondent was a member of the MEK, he would be detained and interrogated upon his arrival in Iran and that he would most likely be subject to torture, since torture is widespread in Iranian prisons (Tr. at 363-64, 402). [redacted] also explained that the Iranian government is likely to know of individuals who participated in demonstrations in front of Iranian consulates or embassies because Iranian diplomats are known to videotape demonstrators (Tr. at 372).

The United States State Department *1999 Country Reports for Human Rights Practices* (Exh. 5B) indicates that supporters of outlawed political organizations, such as the MEK, are believed to make up a large number of those executed each year. *Id.* at 3. The Iranian Constitution forbids the use of torture; however, there are numerous, credible reports that security forces and prison personnel continue to torture detainees and prisoners. *Id.* at 5. Trials in Revolutionary Courts, where crimes against national security and other principal offenses are heard, are notorious for their disregard of international standards of fairness. *Id.* at 7.

We find therefore, based on his prior torture and his known and admitted MEK membership, that it is more likely than not that the respondent will be tortured if returned to Iran and will grant him deferral of removal under the Convention Against Torture.

ORDER: The Service's appeal is sustained in part.

FURTHER ORDER: The Immigration Judge's order is vacated.

FURTHER ORDER: The respondent is granted deferral of removal under the Convention Against Torture.

[redacted]
FOR THE BOARD

PREPARED STATEMENT OF THE HONORABLE RICHARD KRIEGER

Chairman Hostettler, members of the Subcommittee, ladies and gentlemen, I would like to thank you for the privilege of submitting this statement to you today to speak of our concerns regarding the selective implementation of the International Convention Against Torture (CAT),[1] as well as two specific defenses to criminal prosecution, the *ex post facto* defense and the running of the statue of limitations. These actions, or inactions, pose danger for the American citizenry, the nation itself, and give impunity to perpetrators of torture, war crimes, extra judicial killing and other internationally recognized crimes.

Our organization has been involved with the issues of alleged Nazi-era war criminals since the early 1970s and with alleged modern day perpetrators of torture, war crimes, extra judicial killings and terrorism since the late 1990s. We are proud to say that some of those associated with our company played an instrumental hand in the creation of OSI (The Department of Justice Office of Special Investigations dealing with Nazi Era War Criminals) and to work with government investigators and the Office of the U.S. Attorney on some modern day perpetrator cases. We have also been, and continue to be a strong proponent of the Anti-Atrocity Alien Deportation Act.[2]

In 1999, the UN Special Rapporteur on the issue of torture stated, "The phenomenon of torture continues to plague all regions of the world. Significantly, impunity continues to be the principle cause of the perpetuation and encouragement of human rights violations and in particular torture."[3] The United States, either through deliberate action or by chance, has been complicit in allowing those who violate international human rights laws forbidding the use of torture to go unpunished.

Article 3 of CAT prohibits the return of aliens who face the prospect of being tortured, and Congress implemented these protections in the Immigration and Nationality Act.[4] The "deferral of removal" gives aliens who are in danger of suffering torture upon their removal some protection.[5] The regulations[6] allow aliens in removal, deportation, or exclusion proceedings to claim that they "more likely than not" will be tortured if removed from the United States, and to have their removal deferred.[7] In 2002, 75 such deferrals were granted; in 2001 there were 101 and in 2000 there were 213, for a total of 389 cases receiving deferrals from removal since the regulations were implemented.[8]

Each of these aliens fall within one of four categories:

A. The alien assisted in persecution;

B. The alien has been convicted of a particularly serious crime and is regarded to be a danger to the U.S. community;

C. There are reasons to believe the alien committed a serious non-political crime before coming to the U.S.; or

D. There are reasonable grounds to believe the alien is a danger to national security.

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[1] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature*, Dec. 10, 1984, U.N.T.S. (entry into force Jun. 26, 1987, in accordance with article 27(1)). The United States has criminalized torture on the part of government officials, 18 USC 2340A (2003).

[2] Anti-Atrocity Alien Deportation Act of 2003, 8 U.S.C. § 1182, 1227, 1101, 1103 (2003).

[3] *Report on torture and other cruel, inhuman or degrading treatment or punishment: Sir Nigel Rodley, Special Rapporteur of the Commission on Human Rights,* U.N. GAOR, 45th Sess., Annex, Agenda Item 116(a), U.N. Doc. A/54/426 (1999).

[4] *See* 8 USC 1231(b)(3)(B) (2003). For the Administrative Regulations regarding the Treaty, *see* 8 C.F.R. § 208.17–18 (2003).

[5] In addition, the regulations provide a withholding of removal, which is another protection for aliens who fear being tortured upon their deportation. 8 C.F.R. § 208.16. The deferral of removal is "a less permanent form of protection than withholding of removal, and one that is more easily and quickly terminated if it becomes possible to remove the alien." Statistical Year Book for 2002, 2001 and 2000 of The U.S. Department of Justice, Executive Office for Immigration Review.

[6] In February 1999, the Department of Justice (DOJ) and the Immigration and Naturalization Service (INS) jointly published a rule to "formally implement U.S. obligations under an international treaty provision designed to protect person form being returned to countries where they face torture." News Release, the Department of Justice, "Department of Justice Issues Formal Rule for Claims Under the United Nations Torture Convention" February 26, 1999, available at http://www.immigration.gov/graphics/publicaffairs/ newsrels/torture.htm

[7] Statistical Year Book for 2002, 2001 and 2000 of The U.S. Department of Justice, Executive Office for Immigration Review.

[8] *Id.*

However, we recognize that the recent Supreme Court ruling, *Zadvydas* v. *Davis*,[9] stated that an individual cannot be detained for more than three months without a charge, which means that these 389 individuals as well as many of those that have been refused deferral are probably on the streets right now with no threat except possible deportation. As a result we stand in opposition to the Deferral of Removal Program, unless, the individuals in question are being investigated for prosecution in the United States.

These figures and statements pose a few serious questions for the government to answer, such as

a. Is there government data breaking down the figures as to the number of persons who fit into each of the four categories, both for those approved and disapproved?
b. Is there government data to show how many cases applying for deferral were denied?
c. Of the cases of deferral that were denied, how many have left the country and through what means (deportation, voluntary departure, etc)? Of those deported, how many were escorted to their country of origin and turned over to the authorities?
d. Has the government been monitoring the movements and actions of these 389, as well as those that were denied and still remain here and if so how?
e. Has the federal government notified state and local law enforcement of these 389 individuals and their whereabouts, since these individuals may represent threats to citizens of their locale as well as to the locality itself?
f. Does the federal government know the location of all 389 approved individuals as well as those denied that still remain here?
g. Has the government monitored the countries from which these individuals have been given relief to continuously assess the threat the country may represent to these individuals?
h. Recognizing that denied cases still present a danger to communities and many could still be in the United States, have state law enforcement agencies been notified of their whereabouts?

IEM remains concerned about the enforcement of CAT because of past political decisions made by the State Department. For example in March 2000, Peruvian Army Major Tomas Ricardo Anderson Kohatsuwho, accused of raping and torturing an intelligence officer, was allowed to leave the United States under the cloak of diplomatic immunity. The Department of Justice had initially detained him but the State Department intervened to free him, and there were subsequent accusations that his immunity was granted incorrectly.[10] In addition, the murder of the two U.S. diplomats in Sudan by the Black September Organization in 1973, acknowledged by the State Department in cable, but incorrectly insisted the United States did not have the legal authority to prosecute the murders. We would recommend that the U.S. use organizations such as the U.N. Committee Against Torture and the Bureau d'Avocats Internationaux (International Lawyers Bureau)[11] in Haiti to obtain information on torture. As a measure of the progress in prosecution of war criminals, the International Lawyers Bureau has stated that perpetrators, such as those who participated in the infamous Rabotou massacre[12] have not been tortured upon their return.[13]

Article 5 of CAT establishes an obligation on member states to investigate individuals suspected of having committed acts of torture when they are present in that state or its territories, and to either extradite them for trial or to prosecute them, regardless of where or when such acts occurred. While prosecution should take place in the country in which the crime was committed, or in which the individual is a

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[9] 553 U.S. 678, 682 (2001)

[10] Amnesty International Report Charges US is "Safe Haven" for Torturers Fleeing Justice Eight Years On, US Has Failed to Prosecute a Single Individual for Torture, *available at* http://www.amnestyusa.org/news/2002/usa04102002.html

[11] The International Lawyers Bureau is a group of attorneys that helps Haitian victims and the judiciary prosecute human rights violations from Haiti's 1991–94 dictatorship.

[12] The Raboteau massacre in 1994 involved the murder of at least fifteen individuals in Raboteau, near Gonaïves, which were committed by Haitian soldiers and FRAPH members. See Human Rights Watch World Report 1998, *see http://www.hrw.org/worldreport/americas-07.htm.*

[13] For a discussion on the trial of those responsible for the Rabotou massacre, *see* HAITI:Human Rights Challenges Facing the New Government, *available at* http://web.amnesty.org/library/Index/ENGAMR360022001.

citizen, if that situation is not available, then CAT requires its member nations to prosecute the individual.[14]

Article 6 of CAT establishes that a nation in whose territory a person alleged to have committed acts of torture is present shall upon being satisfied after an examination of information available, take him into custody to ensure his presence. Custody or other legal measures may only be continued for as long as necessary to enable criminal or extradition proceedings to be initiated.[15]

Article 7 of CAT authorizes a nation to extradite an alleged offender.[16]

Recognizing that the U.S. has felt that ratification of CAT meant that CAT had to be implemented, why has the implementation been done selectively and important articles ignored? The question arises, since in accepting CAT, the United States did not preclude these articles, then why are we not implement them? [17] Such a position is hypocritical and indicates that we are providing impunity to perpetrators.

Some would argue that even if we were to accede to all the sections of CAT, there are other concerns that would bar our prosecution. The statue of limitations on crimes of torture would be used by every defense attorney, but with the passage of the Patriot Act, which removes all statutes of limitation on crimes that fall within its broad definition of what constitutes terrorism, one could argue that the statue of limitations for acts of torture no longer applies, since most acts of torture could arguably fall within the statues wide purview.[18]

We then come to the *ex post facto* defense, which is apparently a concern of the Department of Justice and one of the other reasons that they have failed to prosecute suspected torturers under CAT. U.S. Senator Charles Grassley articulates the reasons why the ex post facto issue should not prevent the prosecution of those who commit acts of torture,

The *ex post facto* issue revolves around an accused person's right to fair warning and treatment. Evidence from international law and other sources is quit relevant to establish this fair warning even if these sources are not codified in the Federal statue. . . . The Supreme Court has subsequently clarified the meaning and scope of the *ex post facto* prohibition, emphasizing its function to deter prosecution in the absence of fair warning. . . . Perpetrators cannot reasonably argue that torture is not universally condemned and, therefore, they were unaware of the illegal nature

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[14] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 1, at art. 5.

[15] *Id.* at art. 6.

[16] *Id.* at art. 7.

[17] For a similar view of America's lack of enforcement of CAT, *see* Amnesty International Report, *supra* note 8.

[18] *See* 18 USC 3286 (b) No limitation.—Notwithstanding any other law, an indictment may be found or an information instituted at any time without limitation for any offense listed in section 2332b(g)(5)(B), if the commission of such offense resulted in, or created a foreseeable risk of, death or serious bodily injury to another person. 18 USC 2332b(g) (5) (B): defines Federal terrorist crimes as a violation of——

(i) section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175 or 175b (relating to biological weapons), 229 (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 (relating to congressional, cabinet, and Supreme Court assassination and kidnapping), 831 (relating to nuclear materials), 842(m) or (n) (relating to plastic explosives), 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death), 844(i) (relating to arson and bombing of property used in interstate commerce), 930(c) (relating to killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 956(a)(1) (relating to conspiracy to murder, kidnap, or maim persons abroad), 1030(a)(1) (relating to protection of computers) , 1030(a)(5)(A)(i) resulting in damage as defined in 1030(a)(5)(B)(ii) through (v) (relating to protection of computers), 1114 (relating to killing or attempted killing of officers and employees of the United States), 1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (relating to hostage taking), 1362 (relating to destruction of communication lines, stations, or systems), 1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States), 1366(a) (relating to destruction of an energy facility), 1751(a), (b), (c), or (d) (relating to Presidential and Presidential staff assassination and kidnapping), 1992 (relating to wrecking trains), 1993 (relating to terrorist attacks and other acts of violence against mass transportation systems), 2155 (relating to destruction of national defense materials, premises, or utilities), 2280 (relating to violence against maritime navigation), 2281 (relating to violence against maritime fixed platforms), 2332 (relating to certain homicides and other violence against United States nationals occurring outside of the United States), 2332a (relating to use of weapons of mass destruction), 2332b (relating to acts of terrorism transcending national boundaries), 2332f (relating to bombing of public places and facilities), 2339 (relating to harboring terrorists), 2339A (relating to providing material support to terrorists), 2339B (relating to providing material support to terrorist organizations), 2339C (relating to financing of terrorism, or 2340A (relating to torture) of this title.

of their actions. Applying the logic of *Calder* v. *Bull*,[19] torture is not an act that is innocent when done.[20]

American courts too have condemned torture as a violation of international law, "In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."[21]

Beyond the American articulation of this idea of notice that torture is unacceptable, there is a great deal of legal history to support the theory that fair notice of torture, war crimes and murder has been extended by international law. One would only have to look at the International Military Tribunal at Nuremberg and the Tokyo War Crimes Tribunal. The International Tribunals of the former Yugoslavia stated that the Geneva Convention was part of customary international law and dismissed an *ex post facto* motion. The international community, represented by the body of the U.N., has declared that "even before the entry into force of the Convention Against Torture, there existed a general rule of international law which should oblige all states to take effective measures to prevent torture and to punish acts of torture."[22]

CONCLUSION

In review of the issues of statue of limitations, *ex post facto*, and The International Convention Against Torture we recommend that:

a. That each case of deferral of removal be reviewed by the Department of Justice for applicability and that each party offered deferral of removal be detained until such time as he can be brought to trial in the United States or extradited for trial to a cooperating country.
b. That each case of deferral of removal allowed to leave detention be monitored as to location and conduct. Further, that applicable state/local agencies be informed of any and all of these perpetrators in their areas.
c. That all perpetrators of human rights crimes brought to the attention of the Department of Homeland Security and/or the Department of Justice be investigated for the purpose of extradition or deportation for trial or for the purpose of prosecution in the United States.
d. That the Department of State be instructed not to attempt to politicize cases involving these perpetrators.
e. That the use of the USA PATRIOT Act, and imposition of statutes of limitations on cases involving perpetrators of torture be made invalid.
f. That based on international and American case history as well as the positions of legal scholars that fair warning has been provided to all perpetrators of torture through international law and as such renders the ex post facto defense invalid in cases of torture.

PREPARED STATEMENT OF MORTON SKLAR

The World Organization Against Torture USA is the leading information clearinghouse and legal support center in the U.S. dealing with Convention Against Torture issues and cases. We serve as the U.S. affiliate of an international network of over 200 human rights organizations worldwide, each focusing on human rights compliance in their own countries, and on torture related issues.

Our group gives special emphasis to problems and issues associated with refugees and aliens seeking protection from torture in their home countries, with a particular focus on gender-based concerns. We provide direct legal representation in a number of cases presenting the most significant legal issues arising under CAT, as well as providing back-up legal assistance and information clearinghouse services in over 200 other CAT cases annually based on requests received from aliens, detainees and lawyers. On average, three to four of our primary cases are presented before U.S.

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[19] 3 U.S. 386 (Dall.) (1798).
[20] Barnhizer, David (ed.). Effective Strategies for Protecting Human Rights: Economic Sanctions, Use of National Courts and International For and Coercive Power. (2001), citing testimony at a Hearing Before the Senate Subcommittee on Security and Terrorism in 1986.
[21] *Filartiga* v. *Pena-Irala,* 630 F2d 876, 881 (2d Cir. 1980).
[22] Report of the Committee against Torture, U.N. Doc. A/45/55 (1990).

Circuit Courts of Appeals each year. Presently we have major appeal cases pending before the 4th, 7th and 11th Circuit Courts of Appeals. In October, 2002 we presented an *amicus curiae* brief to the U.S. Supreme Court in a juvenile death penalty case.

Morton Sklar, the Executive Director of our group, also serves as a member of the Board of Directors of Amnesty International USA (since 1997), and as a Judge with the Administrative (Labor) Tribunal of the Organization of American States (since 1996), nominated to that position by the U.S. Government, and elected by the General Assembly of member states of the OAS.

I. Introduction. Since the Convention Against Torture (CAT) was ratified as an international treaty by the U.S. Senate (1994) and was fully adopted as part of U.S. law by the adoption of two statutes by the U.S. Congress, and implementing regulations by the Immigration and Naturalization Service (1998 and 1999), it has made a number of major contributions of importance to our country in support of the principles of democracy and human rights. These include:

I. keeping our deportation and extradition processes from returning aliens to situations involving torture;

II. increasing the likelihood that torturers and other major human rights abusers will be held accountable for their actions through both criminal prosecutions, and civil liability lawsuits in U.S. courts;

III. protecting U.S. citizens from major abuses here in this country;

IV. supporting our efforts to promote human rights compliance and prevent torture in foreign nations; and,

V. building a stronger base of democratic and human rights oriented standards and institutions throughout the world, as the strongest defense for the rule of law and against terrorism, extremism and military rule.

To maintain these efforts and benefits, we must be careful to keep the standards and protections embodied in the Convention Against Torture intact, and to strengthen, not weaken the perception of the United States as a staunch defender of human rights, and protector of those victimized by acts of torture and repression. This means:

I. guarding against the temptation to support the use of torture by other nations to punish or obtain information from suspected terrorists;

II. taking more seriously our government's responsibility to prosecute torturers and other major human rights abusers in U.S. courts, instead of excluding or deporting them to other countries;

III. not coming to the defense of torturers and repressive regimes by seeking their immunity from civil liability lawsuits, or otherwise defending their interests in U.S. courts (e.g., the Unocal case involving forced labor in Burma, and the Jiang Zemin case involving genocide and torture against Falun Gong practitioners in China); and,

IV. providing a model to other nations in demonstrating our commitment to preventing serious forms of human rights abuses in our own country; and,

V. not seeking any special exemptions from the coverage of CAT based on anti-terrorism efforts.

The Convention Against Torture is one of the four primary international human rights documents. It stands, along with the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Genocide Convention, as the cornerstone of our country's, and the international community's, effort to stop the most heinous forms of governmental oppression and abuse. What makes our commitment to these human rights standards unique is our understanding that torture should not be tolerated or practiced under any circumstances and for any reason. We believe in and apply this standard because we understand that torture is so horrendous, and so contrary to our ethical, spiritual and democratic beliefs, that it must be absolutely condemned and prohibited, irrespective of perceived justifications. We hope that any consideration of the Convention Against Torture and its applications by the Congress of the United States will be made with this understanding in mind, so that the unconditional nature of the protection against torture is properly preserved.

II. Protecting Refugees and Those Fleeing Persecution and Torture. Our nation's interest in and commitment to CAT begins with the Article 3 requirement that no one be returned to a situation of torture. This absolute prohibition against return to torture is based on the recognition that torture is so abhorrent, and the need for universally condemnation so unconditional, that our nation (and other na-

tions of the world) must not be involved with, or contribute to, the infliction of torture in any way, regardless of the circumstances.

Because torture is deemed unacceptable under any circumstances, CAT protects even criminals, torturers and terrorists from being sent to a situation of torture even though the asylum laws specifically exclude these individuals from eligibility for refugee status. In testimony before the U.S. Senate during the process of ratifying the Convention Against Torture, the U.S. Government make clear its understanding and recognition that even the most abhorrent individuals, including criminals and torturers themselves, were entitled to invoke the protections of CAT in order to prevent being returned to torture in their home countries. The CAT regulations issued by the U.S. Government made a point of noting that CAT allows for "no exceptions to this [non-return to torture] mandate," and that none of the "reservations, understandings, declarations, or provisos contained in the Senate's resolution of ratificaiton" allow for an exemption from Article 3's protection "because of criminal or other activity or for any other reason." The CAT regulations go on to recognize that Article 3 was presented to the Senate "with the understanding that 'does not permit any discretion or provide for any exceptions. . . .'" (CAT Regulations, Federal Register, Feb. 19, 1999, p. 8481)

It is important to note that our nation's obligation under CAT to prevent criminal and torturers from being sent to situations of torture does not mean that we are without the power or ability to deal with their crimes, or to protect our own society from these individuals. To the contrary, while we may be prohibited from sending them back to their home countries, we still are under an obligation to criminally prosecute them for acts of torture or other international or domestic crimes. Moreover, the grant of CAT protection in these special cases is considered temporary, and can be removed whenever the conditions in the home country change so as to eliminate the risk of torture.

Nor are we without a means to protect ourselves once criminals and torturers protected by Article 3 of CAT have served their sentences. Although permanent, or indefinite post-sentence detention can pose its own problems, continued detention is authorized for aliens awaiting deportation where it can be demonstrated through a suitable legal procedure meeting reasonable due protections, that they present a flight risk, or pose a serious threat to the members of our community. Our Government also always has the option of finding another suitable third country refuge for criminals or torturers who can not be sent back to their home countries because of the Article 3 prohibition.

It also should not be forgotten that CAT provides additional protection to many deserving aliens who are not covered by our asylum laws, including rape and torture survivors who, because of traumatic stress syndrome or other problems, miss the one year deadline that is imposed for filing an asylum claim, and many victims of gender-based abuses that are not easily covered by asylum laws because the required linkage to one of the five recognized bases of persecution (race, religion, national origin, political opinion or membership in a social group) is not easy to establish.

III. Holding Torturers and Other Major Human Rights Abusers Accountable for their Actions. The 1994 CAT implementing statue makes torture committed abroad a crime here in the U.S. Two other statutes passed by Congress, the Alien Tort Claim Act, and the Torture Victims Protection Act, allow aliens to file suit in U.S. courts to obtain civil damage restitution from their abusers, even where the violations took place abroad. These Congressional authorizations for criminal and civil liability cases against torturers in U.S. courts have been important tools for helping to punish and prevent major human rights abuses in foreign nations. The civil liability approach has been especially significant since it gives victims the ability to take action themselves to secure redress, instead of having to rely on often reluctant governments (including their own) to act in their behalf.

But unfortunately, all too often the U.S. government has entered these cases on the side of the torturers, seeking dismissal of the Alien Tort Act and Torture Victims Protection Act case in order not to cause distress to foreign governments. This has happened most recently, for example, in lawsuits filed in U.S. Federal District Courts in California against the Unocal Corp, for their involvement in forced labor and torture in Burma in the building of a gas pipeline in that country, and in U.S. Federal District Court in Chicago against Jiang Zemin, former President of China, for his policy to commit torture and genocide against practitioners of the Falun Gong spiritual movement. Our organization serves as co-counsel in the Jiang case, and in two other pending cases involving high level officials of the People's Republic of China, and have had to present a number of legal briefs in these cases challenging efforts by the U.S. government to have the cases dismissed based on the alleged negative impacts on U.S. foreign policy interests by having Chinese officials

defend their human rights abuses in U.S. courts. The U.S. government should be supporting the principle of holding torturers accountable for their abuses, even where our economic and political relations with foreign governments may be affected.

IV. Protecting U.S. Citizens from Abuses in this Country. The U.S. should provide a model to other nations on how we are committed to the principle of preventing torture, even in our own country. In 1998 the U.S. Government issued a report to the Committee Against Torture of the United Nations reviewing our compliance under CAT. Our group issued an evaluation of that report, focused on such issues as our use of the death penalty, police brutality, conditions in prisons, return of refugees and extradited criminals to situations of torture. Our ability to influence other nations, and to prevent torture abroad, must begin with a demonstration that we accept and apply these same standards to ourselves, and that we live by the same rules of law that we insist others abide by.

V. Promotion of Human Rights Observance and the Abolition of Torture and the Threat of Terrorism in Other Nations. Promoting the rule of law and human rights observance by other nations is a key element in our government's effort to strengthen democracy and democratic institutions in foreign countries, and ultimately to prevent instability, extremism and terrorism by stopping their root causes—repression by authoritarian regimes. The core reason that the United States has been one of the primary nations supporting the adoption and enforcement of international human rights standards is our recognition that torture and other human rights abuses form the basis for causing internal instability in nations, and military conflict among nations. The Convention Against Torture, and its absolute prohibition against torture, have come to be recognized as one of the two or three international human rights standards that are so well accepted, and so universally supported, that they have become part of what is referred to as *jus cogens*, the established law of nations that all countries recognize and seek to observe. It would severely undercut our efforts to promote the principles of freedom, democracy and the rule of law if our government takes any action that would be seen as departing from our, and the international community's, staunch adherence to strict observance and application of the Convention Against Torture.

PREPARED STATEMENT OF SUSAN BENESCH

Amnesty International, a worldwide organization with more than one million members, including nearly 300,000 in the United States, has been working to stop torture and torturers for more than 35 years. Such efforts have been widely recognized, perhaps most recently by President George W. Bush, who two weeks ago praised "the efforts of non-governmental organizations to end torture and assist its victims."[1]

As far back as the 1970s, Amnesty International launched an international campaign against torture, leading in part to our Nobel Peace Prize in 1977. In October 2002, we began our newest global Campaign to Stop Torture, which continues today in more than 60 countries. First on the list of goals of the campaign is "to stop torturers and bring them to justice—either in their own countries or in others."[2] We at AIUSA, Amnesty's U.S. branch, are particularly intent that torturers and other human rights violators not be permitted to take refuge in the United States. Last year AIUSA published a major report entitled "The United States of America: A Safe Haven for Torturers," detailing the cases of torturers and human rights abusers who are living in the United States, and setting out a multi-track strategy to combat impunity for torturers.[3]

From our point of view—of longtime, dedicated work against torturers—we urge Congress not to diminish the relief that the United States provides as part of its obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture).[4] That relief—a carefully limited form granted to a very small number of people (only about three percent of all those who seek it)—saves people from torture.

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[1] Statement by President George W. Bush: United Nations International Day in Support of Victims of Torture (June 26, 2002), at [http://www.whitehouse.gov/news/releases/2003/06/20030626–3.html].

[2] Combating Torture: A Manual for Action, Amnesty International, 2003.

[3] United States of America: A Safe Haven for Torturers, Amnesty International USA, 2002, at 8 and 100.

[4] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1965 U.N.T.S. 85.

We strongly and respectfully urge Congress not to create exceptions to that relief, for six reasons. First, it would be contrary to U.S. policy that President Bush has recently reaffirmed. Second, it would violate international law and, specifically, U.S. treaty obligations under the Convention Against Torture. Third, it would violate a longstanding, universal principle: that torture is a gross offense to human dignity, justice, and the rule of law, and an egregious violation of the relationship between a state and its people. Fourth, relief under the Convention Against Torture already is so carefully limited that it bars all but a small percentage of cases—including frivolous ones. Fifth, the United States and its citizens need not face danger from those who are granted relief under the Convention Against Torture.

Last but not least, deporting a serious human rights abuser to a country that will torture him or her is tantamount to "an eye for an eye and a tooth for a tooth." It is no substitute for justice, which the rule of law demands, and which torture victims deserve. Returning a torturer to a place where he or she would be tortured simply sustains the kind of system in which violent authoritarian regimes exist: such regimes feed on continued torture and on impunity. Therefore, instead of deporting individuals alleged to have committed torture and other gross human rights violations to be tortured themselves, the United States should bring them to justice.[5]

1. It Would be Contrary to U.S. Policy to Restrict Convention Against Torture Relief

Not only would it be illegal to create exceptions to Article 3 relief from deportation, it would also be contrary to the well-established U. S. policy to oppose torture without exception. Just two weeks ago President Bush announced that "[F]reedom from torture is an inalienable human right. . . . The United States is committed to the world-wide elimination of torture and we are leading this fight by example . . ."[6]

Similarly on June 25 William J. Haynes II, general counsel for the Department of Defense, wrote Senator Patrick Leahy, "With respect to Article 3 of the CAT, the United States does not 'expel, return ('refouler') or extradite' individuals to other countries where the U.S. believes it is 'more likely than not' that they will be tortured."[7] Mr. Haynes' letter was especially relevant to the issue at hand since he was writing in regard to individuals suspected of wrongdoing.

U.S. stated policy on torture—and the United States' compliance with it—is important not only for its own sake, but also because it is bound to influence the polices of other nations.

2. Restricting Convention Against Torture Relief Would Violate International Law

The Convention Against Torture, which the United States signed under President Ronald Reagan and ratified under President George H.W. Bush, prohibits the United States from deporting a person "to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[8] This prohibition is absolute, under both United States and international law.

The Convention itself allows no exceptions.[9] Nor did the U.S. Senate, in ratifying the treaty, make any reservation, understanding, declaration or proviso that might exclude any person from the Article 3 prohibition against *refoulement*, or return to torture, for any reason. To the contrary, in legislation to implement the Convention Against Torture in 1998, Congress pointed out that any bars to relief must be "consistent with U.S. obligations under the Convention."[10]

International courts and bodies have reaffirmed the absolute prohibition against returning a person to a country where there is a substantial likelihood that he or she will be tortured. The Committee Against Torture, the U.N. entity that monitors

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[5] *See* United States of America: A Safe Haven for Torturers, Amnesty International USA 2002, at 100: "A multi-track strategy to combat impunity."

[6] Statement by President George W. Bush: United Nations International Day in Support of Victims of Torture, *<http://www.whitehouse.gov/news/releases/2003/06/20030626–3.html>*.

[7] Letter from William J. Haynes II, General Counsel, Department of Defense to Senator Patrick J. Leahy, June 25, 2003, <http://www.hrw.org/press/2003/06/letter-to-Leahy.pdf>

[8] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1965 U.N.T.S. 85, at art. 3.

[9] *Id.,* art. 2(2). "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." Note that this absolute prohibition is in contrast to, for example, the Refugee Convention, which excludes people who have committed certain crimes. U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

[10] Act of Oct. 21, 1998, P.L. No. 105–227, Div. G, Subdiv. B, Title XXII, Ch. 3, Subch. B, § 2242(c), 112 Stat. 2681–822, *as cited in* 8 U.S.C. § 1231, Other provisions.

compliance with the Convention Against Torture, has declared that "the protection accorded by [A]rticle 3 of the Convention is absolute." [11] The Committee specifically noted that "the nature of the activities in which the person engaged is not a relevant consideration in the taking of a decision in accordance with [A]rticle 3 of the Convention." [12]

The European Court of Human Rights has held that a similar treaty provision, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, is an absolute bar to the return of an individual to torture—even where a state has a compelling interest in deporting a person due to terrorist activities:

> "Article 3 . . . enshrines one of the most fundamental values of democratic society. . . . The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. . . . Article 3 . . . makes no provision for exceptions and no derogation from it is permissible . . . even in the event of a public emergency threatening the life of the nation." [13]

In addition, the United States' own Board of Immigration Appeals (BIA) has recognized that "the prohibition on refoulement found in Article 3 of the Convention Against Torture provides no exception for persons convicted of particularly serious crimes." [14]

3. The Prohibition Against Torture is a Universal Principle

The prohibition on torture is a longstanding and virtually universal principle. It is a crime in all places and at all times. It is barred not only by the Convention Against Torture but also by the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights, and many other international human rights instruments.[15] Indeed, torturers are considered *hostis humani generis*—enemies of all humanity.[16] "Torture anywhere is an affront to human dignity everywhere," as President Bush put it.[17]

Torture is also an abhorrent abuse of state power against the individual. Returning a torturer to face torture would be intolerable since it would only sustain the same violent, abusive system that permitted the torturer's own crimes—a system that the international community has resolved to abolish.

In other words, no exception may be made to the ban on torture, since an exception would erode the principle itself.[18] Further, respect for human dignity compels us to treat even a torturer as a human being, since human dignity, like the ban on torture, is universal.

4. Relief Under the Convention is Strictly Limited

The United States grants relief from deportation under the Convention Against Torture only in rare cases, since applicants for the relief must overcome a series of difficult obstacles. We mention a few examples of these.

First, the applicant must meet a very high standard, showing that it is "more likely than not" that he or she will be tortured if deported.[19] This is a much higher test than, for instance, the "well-founded fear of persecution" standard required for a grant of asylum.[20] Second, Convention Against Torture relief applies only to cases

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[11] *Aemei* v. *Switzerland,* Committee Against Torture, Communication No. 34/1995 (May 29, 1997).

[12] *Id.*

[13] *Chahal* v. *United Kingdom,* (1996) ECHR 22414/93 (Nov. 15, 1996).

[14] Matter of H-M-V-, 22 I. & N. Dec.256 (BIA 1998).

[15] Universal Declaration of Human Rights , G.A. Res. 217 (A0(III), U.N. Doc. A/810 at 71 (1948), art. 5; International Covenant on Civil and Political Rights , G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, art. 7. *See also* European Convention for the Protection of Human Rights and Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 222 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment"); American Convention on Human Rights, Nov. 22, 1969, art. 5(2), O.A.S.T.S. No. 36 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment").

[16] Schulz, William F., The Torturer's Apprentice: Civil Liberties in a Turbulent Age." The Nation, 13 May 2002.

[17] Statement by President George W. Bush: United Nations International Day in Support of Victims of Torture, <http://www.whitehouse.gov/news/releases/2003/06/20030626–3.html>.

[18] *See* The Right Against Torture is an Absolute One, Asian Human Rights Commission, April 2001, at <http://www.ahrchk.net/pub/mainfile.php/torture3/37/>.

[19] 8 C.F.R. § 208.16(c)(2). *See also* 136 Cong. Rec. at S. 17492 (daily ed., Oct. 27, 1990).

[20] INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

where torture would be committed by a government actor, or under color of law.[21] Third, the applicant must be expecting severe pain and suffering to be inflicted with specific intent—general intent is not enough, no matter how severe the treatment.[22] Fourth, relief is not available for lesser forms of harm, such as cruel, inhuman or degrading treatment or punishment, that do not rise to the level of torture.[23]

There are two types of relief under the Convention Against Torture. The first is called withholding under the Convention.[24] Four categories of people are ineligible for withholding under the Convention: persecutors, non-citizens convicted of "particularly serious" crimes; non-citizens who have committed serious "non-political crimes," and non-citizens who are a danger to U.S. security.[25] Such individuals are granted deferral of removal, which is a special bare-bones, precarious form of relief that forestalls deportation, but gives essentially no other benefits.[26]

According to U.S. government statistics, all these restrictions have limited Convention Against Torture relief to a very small number of people, and most of those have no criminal convictions. The Justice Department's Executive Office for Immigration Review (EOIR) reports that that out of 53,471 total decisions regarding Convention Against Torture relief between fiscal year (FY) 1999 and FY 2002, only 1,741 applicants were granted either withholding or deferral under the Convention. Thus, only 3 percent of applicants received any type of relief under the Convention Against Torture. More than 60 percent of these few successful applicants received withholding, meaning they had no criminal convictions. Only 339 people received the lesser deferral of removal remedy, because they had been convicted of some crime or were otherwise ineligible for withholding under the Convention. Thus, only .63 (three-fifths of one percent) of all applicants received deferral of removal under the Convention during that four-year time span.

Moreover, this rate (the number of people granted deferral under the Convention Against Torture, compared to the total number of Convention claims) is much lower than what it was earlier. EOIR statistics show that from March 22, 1999 to July 31, 2000, 2.5 percent of applicants were granted deferral under the Convention Against Torture.

In September 2000 then-Immigration and Naturalization Service General Counsel Bo Cooper testified before Congress that charges that "the new torture regulations are being abused by criminal aliens" were exaggerated. The statistics showed, he pointed out, that "only a small percentage of claims asserted are actually granted protection under the Convention Against Torture."[27] Currently, the percentage of applicants granted deferral is less than one-quarter of the percentage that Mr. Cooper reported, so an even smaller percentage of claims asserted are being granted to individuals with serious convictions or other bars to withholding. Therefore it would seem that as Mr. Cooper testified in 2000, "fulfilling our international obligations under the Convention Against Torture has not impeded our ability to expeditiously enforce our immigration laws and remove criminal aliens from the United States."[28]

5. Relief Under the Convention Against Torture Does Not Endanger the United States

The United States and its citizens need not face danger from those who are granted relief under the Convention Against Torture, since they can be sent to a third country where they are not likely to be tortured. There are also other alternatives in U.S. law that Amnesty International does not support—we wish merely to refute the notion that release and deportation to torture are the only alternatives in the case of a non-citizen whom U.S. authorities allege to be dangerous.

Under U.S. law, such a person can be detained, or deported to his or her country of origin if the United States first seeks assurances that he or she will not be tor-

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[21] S. Exec. Rep. No. 101–30 (1990), at 14 (Report of the Senate Foreign Relations Committee recommending ratification of the Convention).
[22] Matter of J-E-, 23 I&N Dec. 291, 301 (BIA 2002).
[23] 8 C.F.R. § 208.16(c)(2).
[24] 8 C.F.R. § 208.16(c).
[25] 8 C.F.R. § 208.16(d)(2).
[26] *See* generally 3 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure § 33.10[4] (rev. ed. 2003).
[27] Testimony of Bo Cooper, General Counsel, Immigration and Naturalization Service, Department of Justice, Regarding a Hearing on Convention Against Torture and HR 5285, The Serious Human Rights Abusers Accountability Act of 2000.
[28] *Id.*

tured.[29] In the case of detention, we urge the United States to comply fully with both U.S. and international standards, and we urge that authorities use the least restrictive form of detention possible.

The U.S. Supreme Court limited the indefinite detention of non-citizens in 2001,[30] but authorities may still continue to hold non-citizens who may be dangerous. Non-citizens may be kept in detention for a number of enumerated "special circumstances."[31] Those circumstances include detention on account of security or terrorism concerns and detention because an individual is "specially dangerous" as indicated by having committed one or more crimes of violence, or having a mental condition or disorder making it likely that the individual will engage in future acts of violence.[32]

Another alternative is to deport a non-citizen to a country other than the country of his nationality. This generally requires agreement from the government of the third country. It is worth noting that the United States has persuaded third countries to accept alleged torturers and gross human rights abusers on numerous occasions in the past.[33]

Finally, the United States can seek assurances that an individual will not be tortured, before deporting that person to his or her home country. Under the regulations implementing the Convention Against Torture, "[t]he Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country."[34] The Attorney General or Deputy Attorney must then decide whether the assurances are "sufficiently reliable" to allow deportation consistent with the Convention Against Torture.[35] If and when this measure is used, Amnesty International urges that the U.S. government carefully monitor deportees, and strictly hold the other government to its promises.

6. Instead of Deporting Alleged Torturers to Face Torture Themselves, the United States Should Bring Them to Justice

In opposing the deportation of alleged torturers (or alleged persecutors of other types) to countries where they might face torture themselves, Amnesty International seeks only to prevent torture, not to protect the alleged torturers or other persecutors. To the contrary, Amnesty International advocates bringing alleged human rights violators, including alleged torturers, to justice.[36] We call on the United States, which President Bush recently said is "leading this fight [against torture] by example,"[37] to lead by seeking justice for past acts of torture.

Immigration law restrictions against alleged torturers are not sufficient for fighting impunity. As Amnesty International USA board member William J. Aceves has written, "[D]eportation does not serve as an effective policy [to promote justice]. At best it provides an inconvenience to torturers. At worst, it provides immunity to torturers by returning them to countries where they will not be prosecuted."[38]

As a party to the Convention Against Torture, the United States is obliged to either investigate or extradite for prosecution alleged torturers within its jurisdiction, irrespective of where the torture was committed.[39] When the United States signed the Convention in 1988, the Reagan administration acknowledged that "the core provisions of the Convention establish a regime for international cooperation in the

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[29] 8 C.F.R. § 241.14 "Continued detention of removable aliens on account of special circumstances"; 8 C.F.R. § 208.21(c).

[30] *Zadvydas* v. *Davis,* 533 U.S. 678 (2001).

[31] 8 C.F.R. § 241.14 "Continued detention of removable aliens on account of special circumstances."

[32] *Id.*

[33] After the U.S. invasion of Haiti in 1994, for example, the United States persuaded Panama to accept Gen. Raoul Cedras, who had led Haiti's military junta during a period when Haitian military and paramilitary forces are alleged to have killed and tortured many civilians. *See, e.g.* Hoffman, Lisa, Where are they now: former bloody dictators, Scripps Howard News Service, Jan. 25, 2003, at *<http://www.knoxnews.com/kns/iraq—conflict/article/0,1406,KNS—9217—1698728,00.html>.*

[34] 8 C.F.R. § 208.21(c).

[35] *Id.*

[36] *See generally* United States of America: A Safe Haven for Torturers, Amnesty International USA, 2002, and Torture Worldwide: An Affront to Human Dignity, Amnesty International, 2000.

[37] Statement by President George W. Bush: United Nations International Day in Support of Victims of Torture, at *<http://www.whitehouse.gov/news/releases/2003/06/20030626–3.html>.*

[38] Aceves, William J., Prosecuting Torture in U.S. Courts: The Inapplicability of the *Ex Post Facto* Defense, in Effective Strategies for Protecting Human Rights (David Barnhizer ed., 2001) at 2. *Also see* Matas, David, Canada as a Haven for Torturers, Remarks at the Centre for Refugee Studies, (Feb. 29, 2000) at *<http://www.icomm.ca/?ccvt/haven.html>.*

[39] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1965 U.N.T.S. 85, art. 5(2).

criminal prosecution of torturers . . .”[40] This is the Convention’s requirement that states parties prosecute or extradite torturers in their jurisdictions, no matter where the torture occurred.[41]

The United States need not rely on the Convention’s universal rules, however, to prosecute alleged torturers. Indeed, U.S. law explicitly grants jurisdiction for such cases. Under 18 U.S.C. § 2340A, “Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both . . .”[42] The statute grants jurisdiction if the alleged offender is a national of the United States, or if he or she is “present in the United States, irrespective of the nationality of the victim or alleged offender.”[43]

Prosecution in the United States is one powerful tool against impunity. It should be a vigorous part of a multi-track effort against impunity. As Amnesty International has urged in the past, the United States should:

- Investigate any individual located on territory under its jurisdiction alleged to have committed acts of torture.
- Immediately take into custody or take other legal measures to ensure the presence of any individual located in territory under its jurisdiction alleged to have committed acts of torture upon being satisfied that after an examination of available information that the circumstances so warrant.
- Extradite any individual located in territory under its jurisdiction alleged to have committed acts of torture it if it receives a valid request from a foreign government and it ensures that the individual will not be subject to the death penalty, torture, or other cruel, inhuman or degrading treatment or punishment upon extradition, unless the case is referred to the Justice Department for the purpose of prosecution.[44]

As one torture survivor put it, describing his participation in a case against two Salvadoran generals accused of commanding troops who frequently and systematically committed torture, “Being involved in this case, confronting the generals with these terrible facts—that’s the best possible therapy a torture survivor could have.”[45] In sum, Amnesty International urges Congress and the U.S. government to honor torture survivors and the rule of law by bringing alleged torturers to justice, not sending them—or anyone else—to countries where it is more likely than not that they will suffer torture.

[40] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, , U.S. Senate, Treaty Doc. 100–20 (1988) at iii.

[41] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1965 U.N.T.S. 85, art.5–7.

[42] 18 U.S.C. 2340A(a). The statute also provides for the death penalty. Amnesty International is categorically opposed to the death penalty, which we believe to be a fundamental violation of human rights.

[43] *Id.*

[44] United States of America: A Safe Haven for Torturers, Amnesty International USA, 2002, at 8 (listing these and other recommendations as part of a “multi-track strategy to combat impunity”).

[45] Juan Romagoza Arce, plaintiff, *Romagoza, Gonzalez & Mauricio* v. *Garcia & Vides Casanova*, *as quoted in* Center for Justice and Accountability, Annual Report 2002.